[redacted]

TRANSCRIPT OF RECORD

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

[redacted]

No. [redacted] 276

ANDREW WEBB, APPELLANT,

vs.

[redacted], SOUTHERN TRANSFER COMPANY, AND SOUTHERN PACIFIC RAILWAY COMPANY.

[redacted]

[redacted]

[redacted]

(24,978)

(24,978)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 695.

ANDREW WEST, APPELLANT,

vs.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Page
Caption	*a*
Transcript of record from the district court of the United States for the district of Idaho	1
Addresses of counsel	1
Complaint	1
Answer of Edward Rutledge Timber Co.	7
Answer of Northern Pacific Railway Co.	16
Replication to answer of Edward Rutledge Timber Co.	25
Replication to answer of Northern Pacific Railway Co.	26
Stipulation as to abstract of evidence on appeal	27
Abstract of evidence	28
Testimony of Andrew West	28
John Davegio	31
Olaf Edin	33
Andrew West (recalled)	35
W. H. Batting	35
Newton J. Glover	38
John Stevenson	39
Lloyd E. Gilhan	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 3, 1916.

Page

Complainant's Exhibit No. 1—Certified documents by Commissioner of the General Land Office (not set out here) 40
Plaintiff's Exhibit No. 2—Letter, Register to West, August 16, 1905 41
Letter of authorization by West 41
Letter, Pierce to Commissioner, June 9, 1909 43
Letter, Pierce to Commissioner, March 16, 1910 46
Letter, West to Register, September 10, 1912 48
Plaintiff's Exhibit No. 3—Selection list of the Northern Pacific Railway Company 48
Plaintiff's Exhibit No. 4—List of Northern Pacific Railway Company describing anew lands selected by Cœur d'Alene list No. 61 54
Complainant's Exhibit No. 7—Letter, Proudfit, Commissioner, to Kenyon, May 6, 1913 58
Defendant's Exhibit No. 11—Letter, Pierce to Commissioner, June 9, 1909 60
Defendant's Exhibit No. 8—Letter, Richards, Commissioner, to Register, January 5, 1907 62
Defendant's Exhibit No. 12—(Not set out here) 67
Defendant's Exhibit No. 10—Patent to Northern Pacific Railway Company 67
Defendant's Exhibit No. 3—Map 70½
Decision 71
Decree 87
Assignments of error 88
Appeal and allowance 90
Bond on appeal 91
Præcipe for record 93
Citation and service 94
Return to record 95
Clerk's certificate 96
Certificate of clerk to district court of cost of record on appeal 99
Order of submission 100
Order directing filing of opinion, &c 101
Opinion 102
Decree 113
Petition for appeal 114
Assignment of errors 116
Appeal and allowance 120
Bond on appeal 122
Præcipe for transcript of record 126
Clerk's certificate 129
Citation and service 131

No._____

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANDREW WEST, APPELLANT,

VS.

EDWARD RUTLEDGE TIMBER COMPANY, A CORPORATION, AND NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

TRANSCRIPT OF THE RECORD

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

INDEX TO PRINTED TRANSCRIPT OF RECORD.

	Page
Answer of defendant, Edward Rutledge Timber Co....	7
Answer of defendant, Northern Pacific Railway Co....	16
Abstract of Evidence.....	28
PLAINTIFF'S WITNESSES:	
Batting, W. H.	35
Daviego, John	31
Edin, Olaf	33
Glover, Newton J.	38
Stevenson, John	39
West, Andrew 28,	35
DEFENDANTS' WITNESS:	
Gilhan, Lloyd	39
Assignments of Error	88
Appeal and Allowance	90
Bond	91
Complaint	1
Citation	94
Clerk's Certificate	96
Decision	71
Decree	87
EXHIBITS:	
Plaintiff's Exhibit No. 1.....	40
Plaintiff's Exhibit No. 2.....	40
Plaintiff's Exhibit No. 3.....	48
Plaintiff's Exhibit No. 4.....	54
Plaintiff's Exhibit No. 7.....	58
Defendants' Exhibit No. 3.....	70½
Praecipe	93
Replication to Answer of Edw. Rutledge Timber Co....	25
Replication to Answer of Northern Pacific Ry. Co.....	26
Return to Record	95
Stipulation	27

Names and Addresses of Attorneys.

A. H. KENYON, Spokane, Washington,
MERRITT, OSWALD & MERRITT, Spokane, Washington,
Attorneys for Appellant.
JAMES B. KERR, Portland, Oregon,
STILES W. BURR, Minneapolis, Minnesota,
E. J. CANNON, Spokane, Washington,
Attorneys for Respondents.

In the District Court of the State of Idaho, in and for the First Judicial District.

ANDREW WEST,

Plaintiff,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Complaint.

Plaintiff complains of the defendants and alleges:

I.

That the defendant Edward Rutledge Timber Company, is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in the City of Spokane, Washington.

II.

That at all times herein mentioned the Northern Pacific Railway Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

III.

That at all times herein mentioned the plaintiff was and now is a citizen of the United States, over the age of twenty-one years, and qualified to enter and acquire title to one hundred and sixty acres of land under the laws of the United States.

IV.

That on or about the 15th day of May, 1903, the plaintiff located and settled upon the Southeast Quarter of Section 20, Township 44 North, Range 3, E. B. M., then unsurveyed, situated in the County of Shoshone, State of Idaho, within the Coeur d'Alene Land District, and has ever since continuously resided upon said land, cultivated and improved the same, and is now residing thereon.

V.

That at the time of the location and settlement by plaintiff upon the land above described, the same was vacant, unoccupied and unsurveyed land belonging to the United States, and no claim of right or title to, or interest in, the said lands and premises or any part thereof had then been made by any person, persons, or corporation whomsoever, nor was there any evidence whatsoever upon the said land or premises or any part or parcel thereof, nor in the United States Land Office for the district in which said land was situated, to-wit, in the Coeur d'Alene Land District, nor in the General Land Office in Washington, D. C., showing any claim, right, title or interest by any person, persons or corporation whomsoever, to the said lands and premises or any part or parcel thereof, nor were there any marks, blazes, notices or other evidence whatsoever of the location, selection, claim or possession marked or traced upon the ground, or upon or near the same or any part thereof, nor had the boundaries thereof been traced or located by reference to any natural objects or permanent monuments, or marked or located by any monument of any kind or character whatsoever; that no person had prior to the location and settlement, of this plaintiff upon said land, nor since said settlement, and to date hereof, ever entered upon the same or attempted to locate or reside thereon, or on any part or parcel thereof.

VI.

That on the 17th day of July, 1905, the official plat of the survey of the land and premises hereinbefore described was filed in the local land office in Coeur d'Alene City, Idaho, and on said date the said lands first became open for entry under the homestead laws of the United States, and on said date plaintiff duly made application to enter said lands in the manner and form required by law under the homestead laws of the United States, which said application was rejected by the local land office, and thereafter and on the 10th day of May, 1910, said order rejecting the application of the plaintiff to file as aforesaid was approved by the Secretary of the Interior, and the case finally closed.

VII.

That on the 21st day of June, 1901, the Northern Pacific Railway Company filed in the General Land Office its selection list No. 61, which said list contained the following pretended description, to-wit: "The Southeast Quarter of Section 20, Township 44 North, Range 3, E. B. M." That at the time of filing said selection list No. 61, said pretended description was wholly imaginary, and no lands in the State of Idaho or elsewhere were or could be so designated or described; for the reason that at the time of filing same as aforesaid no such survey had been made or attempted. That neither the said Northern Pacific Railway Company or any of its servants, agents, attorneys or employees knew or pretended to know what lands were referred to in said pretended description, nor did said defendant then know that in the event of a survey thereafter that said pretended description would be applied to the lands and premises now occupied by the plaintiff as aforesaid, and which said pretended description was the sole and only description contained in said list and selection, and which said pretended description was then and there wholly insufficient to locate

or describe the lands and premises thereafter located and settled upon the plaintiff as hereinbefore alleged, or any part or parcel thereof, or any lands in the State of Idaho, or elsewhere, rendering said list and selection by defendant Northern Pacific Railway Company, wholly void and of no force or effect whatsoever.

VIII.

That thereafter on the 10th day of October, 1910, a patent to said land was issued to the Northern Pacific Railway Company, a corporation.

IX.

That plaintiff is informed and believes and therefore alleges the facts to be, that subsequent to the 21st day of June, 1901, and prior to the commencement of this action the Northern Pacific Railway Company, a corporation, transferred and caused to be transferred to the defendant Edward Rutledge Timber Company, a corporation, all of its right, title and interest in and to the land and premises hereinbefore described, and the said Edward Rutledge Timber Company, a corporation, now claims to be the owner of the legal title to the lands and premises above described.

X.

That neither the said Northern Pacific Railway Company, a corporation, or the said Edward Rutledge Timber Company, a corporation, or any agent, servant, attorney, or employee whomsoever of either of said defendants have ever been in possession of the said land and premises or any part or parcel thereof, but the possession thereof since the 15th day of May, 1903, has been and is now in this plaintiff to the exclusion of all other person, persons or corporation whomsoever; that neither of said defendants have ever complied with the laws of the United States so as to entitle them or either of them to claim any interest in or right or

title to the said lands and premises or any part or parcel thereof as against this plaintiff.

XI.

That the action and decision of the local land office rejecting the application of the plaintiff to enter upon the land and premises hereinbefore described under the homestead laws of the United States on the 17th day of July, 1905, was and is contrary to law, and in violation of the rights of this plaintiff, and the approval of said decision rejecting said application of the plaintiff by the Commissioner of the General Land Office, and the approval thereof by the Secretary of the Interior, were and are wrongful and unlawful and based upon an erroneous construction of the law, and upon a statement of facts upon and concerning which there was and is no conflict.

XII.

That long prior to the said 10th day of October, 1910, and on said date, and at the time of the issuance of the patent to the Northern Pacific Railway Company, a corporation, to the land and premises herein described, this plaintiff was and at all times since has been and now is, the owner and lawfully entitled to the patent for and the legal title to said premises and each and every part thereof.

XIII.

That each and every, all and singular of the acts of the defendants herein and each of them of and concerning their attempted selection and claim in and to said land and premises, and all the acts and proceedings of the Commissioner of the General Land Office and the Secretary of the Interior in connection therewith, and in the issuance of said patent are and were contrary to and without authority at law, and in violation of the rights of this plaintiff, and that at the time of the pretended initiation of said claim on the

part of the Northern Pacific Railway Company in and to said lands and premises, the said Northern Pacific Railway Company was wholly without any right or authority at law to select or claim the said land or any part thereof, and that the Act of Congress of the United States dated March 2nd, 1899, under and by virtue of which the said defendant Northern Pacific Railway Company based the right to select and claim said lands, is unconstitutional and void, and confers no right whatsoever upon said defendant to select or claim said land or any part thereof as against this plaintiff.

WHEREFORE, plaintiff prays that if he be adjudged and decreed to be the owner of the lands and premises herein described, and entitled to the possession thereof, and in the possession thereof, and that the defendants and each of them be decreed to hold such title as they may possess under the patent of the United States in and to said premises in trust for this plaintiff, and for the sole use and behoof of this plaintiff, and that they be decreed to convey the same to this plaintiff by proper deed of conveyance and that the title thereto be forever quieted in this plaintiff, and for his costs and disbursements in this action expended, and for such other and further relief in the premises as to the Court may seem equitable and just.

JOHN H. WOURMS,
Residence and P. O. Address, Wallace, Idaho.
H. W. RICH,
A. H. KENYON,
P. O. Address, Spokane, Wash.
Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

Andrew West, being first duly sworn says: That he is the plaintiff named in the above entitled action; that he has

read the foregoing complaint, knows the contents thereof, and that the same is true, of his own knowledge except as to those matters stated on information and belief and as to those matters he believes it to be true.

ANDREW WEST.

Subscribed and sworn to before me this 13th day of April, 1912.

(Notarial Seal) CHAS. A. JONES,
Notary Public, Residing at Spokane, Washington.

(Endorsed): No. 3173. In District Court of the State of Idaho, in and for the First Judicial District. Andrew West, Plaintiff, vs. The Edward Rutledge Timber Co., and Northern Pacific Railway Company, Defendants. Complaint. Filed June 5, 1912, at 9:45 o'clock a. m. John P. Sheehy, Clerk of District Court, by L. R. Adams, Deputy Clerk. John H. Wourms, H. W. Rich and A. H. Kenyon, Attys. for Pltf.

(Endorsed): Filed July 13, 1912, at 4 o'clock p. m., A. L. Richardson, Clerk U. S. Courts. By Lawrence M. Larson, Deputy.

Answer of Edward Rutledge Timber Co.

In the District Court of the United States for the District of Idaho, Northern Division.

In Equity.

ANDREW WEST,

Complainant,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Answer of Defendant Edward Rutledge Timber Co.

Now comes the defendant Edward Rutledge Timber Com-

pany, and for its answer to the bill of complaint of the complainant, Andrew West, says:

1. Defendant admits that it is and was at all the times mentioned in the bill of complaint a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business in the City of Spokane, in said State; and alleges that previous to the times mentioned in the bill this defendant had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that this defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

2. Defendant admits that the defendant Northern Pacific Railway Company is and was at all the times mentioned in the bill a corporation organized and existing under the laws of the State of Wisconsin; and on information and belief alleges that previous to the times mentioned in the bill defendant Northern Pacific Railway Company had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that said defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

3. Defendant has no knowledge or information sufficient to form a belief as to whether the complainant is a citizen of the United States, but admits and avers that

complainant is a resident and inhabitant of the State of Idaho.

4. Defendant has no knowledge or information sufficient to form a belief as to whether the complainant is or was, at any of the times mentioned in his said bill, qualified or entitled to enter or acquire title to public land of the United States under the homestead or other laws of the United States.

5. Defendant admits that at some time prior to the year 1906 complainant went upon the land described in his said bill, viz: the Southeast quarter (SE¼) of Section twenty (20), in Township forty-four (44) North, Range three (3) West of Boise Meridian, in the County of Shoshone and State of Idaho, and constructed a dwelling thereon, and that complainant has occupied said dwelling at intervals since that time; but this defendant has no knowledge or information sufficient to form a belief as to the date when complainant so went upon said land and so constructed said dwelling thereon, or as to whether complainant ever located and settled on said land or any part thereof or established a residence thereon, or has ever resided upon or improved the same except as aforesaid, or is now residing thereon; and denied that since complainant went upon said land as aforesaid he has continuously resided thereon, or that he has continuously or otherwise cultivated the same.

6. Defendant denies that complainant ever attempted, in good faith, to establish a residence on said land or to make his home thereon, or endeavored in good faith or otherwise, to comply with the homestead laws of the United States, or to acquire the said land or any part thereof as his home; and alleges that, on the contrary, the said land is and always has been principally, if not wholly, valuable for the timber thereon; that the same is rough and unfertile and of substantially no value for agricultural purposes; and that complainant went upon the same and

endeavored to acquire title thereto, not with the intent of making a home thereon, but with intent to acquire the valuable timber thereon for speculative purposes.

7. Defendant denies that at the time of complainant's alleged settlement on the said land, or at any time since the 21st day of June, 1901, the same was vacant, unoccupied or unappropriated public land of the United States, or free from claim of right or title; and denies that at the time of such alleged settlement, or at any time after the 21st day of June, 1901, there was no evidence upon the said land, or in the United States Land Office of the district in which said land was and is situated, to-wit: in the United States District Land Office at Coeur d'Alene, Idaho, or in the General Land Office at Washington, D. C., showing that said land was claimed by the defendant Railway Company or this defendant, or that the boundaries of said land had not then been traced, marked or located by monuments; and alleges that, on the contrary, the said land was at all times subsequent to the 21st day of June, 1901, segregated from the public domain and appropriated by the selection thereof made by the defendant Northern Pacific Railway Company as hereinafter set forth, and was therefore not open or subject to any other appropriation, entry or claim; that the fact of such selection, appropriation and segregation appeared upon the face of the records of the said United States Land Office at Coeur d'Alene, Idaho, and the records of the General Land Office at Washington, D. C.; that the boundaries of the said land and the lines of survey thereof were duly and plainly traced and marked out upon the land and located by monuments long prior to the time when complainant went upon said land and made his alleged settlement thereon; that at the time complainant first went upon said land and at all times thereafter complainant had full knowledge and notice of the selection of said land by the defendant Railway Company as hereinafter set

forth, and of the segregation and appropriation of said land by virtue of such selection; and that complainant went upon said land and made his alleged settlement thereon and thereafter occupied the same and made application to enter the same under the homestead laws, and endeavored to acquire title thereto, not in good faith, but well knowing of the defendant Railway Company's prior selection thereof and of this defendant's right thereunder, and in the hope that the claim of these defendants to the land might be defeated on technical grounds and that complainant might acquire said land and the valuable timber thereon for purposes of speculation.

8. Defendant alleges that on the 21st day of June, 1901, the land described in the bill of complaint was unsurveyed public land of the United States, non-mineral in character, not reserved, and to which no adverse right or claim had attached or been initiated; that the same was situated within the County of Shoshone and the State of Idaho, through which the railroad of the Northern Pacific Railroad Company was constructed and through which the same had been operated by said Railroad Company and by the defendant Railway Company, as its successor, and was then being operated by the defendant Railway Company; that said land was so classified as non-mineral at the time of actual government survey; that on said 21st day of June, 1901, the defendant Railway Company duly made selection of the said land under the provisions of the Act of Congress entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the "Mount Ranier National Park," approved March 2, 1899 (30 Stat. L. 993), in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of said Act of Congress; that said selection was duly made by filing in the said United States Land Office at Coeur

d'Alene, Idaho, a proper selection list or application to select, which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules, regulations and practice established and approved by the Secretary of the Interior and the Commissioner of the General Land Office; that said selection list properly and accurately described said land so selected, in such manner as to designate the same with a reasonable degree of certainty, as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; that said selection list was in all respects regular and proper in form and substance, and that the same was duly accepted, approved and allowed by the Register and Receiver of the said United States Land Office.

9. Defendant further alleges that on or about the 17th day of July, 1905, the official township plat of survey of the township in which the said land is situated was filed in the said United States Land Office at Coeur d'Alene, Idaho; and that shortly after said last mentioned date and within the time specified in said Act of Congress, the defendant Railway Company caused to be made and filed in said United States Land Office at Coeur d'Alene, Idaho, in accordance with the provisions of Section 4 of said Act, a new selection list embracing the selections embraced in the said selection list of June 21, 1901, including the selection of the land described in the bill, describing the land so selected according to such survey; which said supplemental list was so made and filed in exact compliance and in accordance, in matters of form as well as substance, with the provisions of the said Act of Congress and the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office applicable to such selections.

10. Defendant alleges that prior to the time when com-

plainant first went upon said land and the time when he made his alleged settlement thereon, the said land had been surveyed in the field by the official surveyors of the United States, under the direction of the Surveyor General and the Commissioner of the General Land Office; that the lines of survey and the boundaries of said tract of land were properly and plainly marked out upon the land by monuments, blazes and other marks; that the said survey so made was thereafter approved by the Surveyor General of the United States and the Commissioner of the General Land Office, according to law; that the lines of survey so traced and marked are identical with the lines of survey shown on the township plat of survey filed as aforesaid; and that the said lines of survey, and the boundaries of the said tract of land as established and defined thereby, were well known to complainant at the time complainant went upon said land and made his alleged settlement thereon and at all times thereafter.

11. Defendant denies that at the time the defendant Railway Company's said selection list was so filed the description of the said land contained in said selection list was imaginary, and denies that the description contained in said selection list was insufficient to designate, locate or describe the lands so selected, and alleges that in and by said selection list the said land was properly and sufficiently described, in such manner as to designate the same with a reasonable degree of certainty, in the manner prescribed and required by the said Act of Congress and by the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to selections under said act.

12. Defendant admits that shortly after the township plat of survey was filed in the said United States Land Office at Coeur d'Alene, Idaho, as hereinbefore set forth, complainant tendered to the Register and Receiver of said Land

office an application to enter the said land under the homestead laws of the United States; that such application was rejected by said Register and Receiver; and that thereafter the action of said Register and Receiver in so rejecting said application was confirmed by the Commissioner of the General Land Office and by the Secretary of the Interior; but defendant has no knowledge or information sufficient to form a belief as to whether or not such application to enter said land was made by complainant in the form and manner required by law, or in compliance with the rules, regulations and practice of the General Land Office or of the Department of the Interior governing such applications; and alleges that the action of the said Register and Receiver in so rejecting such application, and of the Commissioner of the General Land Office and the Secretary of the Interior in so confirming such rejection, was right and proper and in accordance with law, and not in violation of any right of complainant; and defendant further denies that the decisions of said officers were based upon an erroneous construction of the law and upon a state of facts concerning which there was and is no conflict or dispute, and alleges, on the contrary, that the decisions of said officers were based upon questions of mixed law and fact.

13. Defendant alleges that the said selection so made by the defendant Railway Company of the land described in said bill of complaint, and the said selection lists so filed by it were thereafter duly approved and allowed by the Commissioner of the General Land Office and by the Secretary of the Interior, pursuant to and as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; and that thereafter, and at or about the time stated in said bill of complaint, a patent of the United States conveying the said land to the de-

fendant Railway Company was duly issued, granted and delivered to the defendant Railway Company in accordance with law.

14. Defendant admits and alleges that after the 21st day of June, 1901, and prior to the time when complainant first went upon said land, this defendant entered into an agreement with the defendant Railway Company, whereby the defendant Railway Company, for a valuable consideration paid to it by this defendant, sold the said land to this defendant, and undertook and agreed to convey the same to it by warranty deed; and that thereafter the defendant railway company did duly convey the said land to this defendant, by warranty deed dated the 11th day of February, 1911.

WHEREFORE, Defendant prays that it be hence dismissed, with costs.

EDWARD RUTLEDGE TIMBER COMPANY,
By Charles A. Weyerhaeuser, Secretary.

Charles W. Bunn,
Edward J. Cannon,
Charles Donnelly,
Grafton Mason,
Stiles W. Burr,
R. L. Black,
Solicitors and of Counsel for Defendant.

State of Minnesota,
County of Morrison.—ss.

Charles A. Weyerhaeuser, came before me personally and being duly sworn on oath deposes and says that he is the Secretary of the above named defendant Edward Rutledge Timber Company and authorized to make this affidavit in its behalf, that he has read the foregoing answer, and that the same is true of his own knowledge, except as

to those matters therein stated on information and belief, and that as to such matters he believes it to be true.

(Corporate Seal)

CHARLES A. WEYERHAEUSER.

Subscribed and sworn to before me this 29th day of August, 1912.

(Notarial Seal) HERMAN UTSCH,
Notary Public, Morrison County, Minnesota.
My Commission Expires April 30, 1913.

(Endorsed): Filed September 26, 1912, A. L. Richardson, Clerk.

Answer of Northern Pacific Railway Co.

In the District Court of the United States for the District of Idaho, Northern Division.

In Equity.

ANDREW WEST,

Complainant,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and the NORTHERN PACIFIC RAILWAY COMPANY, a corporation.

Defendants.

Answer of Defendant Northern Pacific Railway Company.

Now comes the defendant, Northern Pacific Railway Company, and for its answer to the bill of complaint of the complainant, Andrew West, says:

1. Defendant admits that it is and was at all the times mentioned in the bill of complaint a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business in the City of Spokane, in said State; and alleges that previous to the times mentioned in the bill this defendant had in all things

duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that this defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

2. Defendant admits that the defendant Edward Rutledge Timber Company is and was at all the times mentioned in the bill a corporation organized and existing under the laws of the State of Washington; with its principal place of business in the City of Spokane, in said State, and on information and belief alleges that previous to the times mentioned in the bill said defendant Edward Rutledge Timber Company had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that said defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

3. Defendant has no knowledge or information sufficient to form a belief as to whether the complainant is a citizen of the United States, but admits and avers that complainant is a resident and inhabitant of the State of Idaho.

4. Defendant has no knowledge or information sufficient to form a belief as to whether the complainant is or was, at any of the times mentioned in his said bill, qualified or entitled to enter or acquire title to public land of the United States under the homestead or other laws of the United States.

5. Defendant admits that at some time prior to the year 1906 complainant went upon the land described in this said bill, viz: the Southeast quarter (SE¼) of Section twenty (20), in Township forty-four (44) North, Range three (3) West of Boise Meridian, in the County of Shoshone and State of Idaho and constructed a dwelling thereon, and that complainant has occupied said dwelling at intervals since that time; but this defendant has no knowledge or information sufficient to form a belief as to the date when complainant so went upon said land and so constructed said dwelling thereon, or as to whether complainant ever located and settled on said land or any part thereof or established a residence thereon, or has ever resided upon or improved the same except as aforesaid, or is now residing thereon; and denies that since complainant went upon said land as aforesaid he has continuously resided thereon, or that he has continuously or otherwise cultivated the same.

6. Defendant denies that complainant ever attempted, in good faith, to establish a residence on said land or to make his home thereon, or endeavored in good faith or otherwise, to comply with the homestead laws of the United States, or to acquire the said land or any part thereof as his home; and alleges that, on the contrary, the said land is and always has been principally, if not wholly, valuable for the timber thereon; that the same is rough and unfertile and of substantially no value for agricultural purposes; and that complainant went upon the same and endeavored to acquire title thereto, not with the intent of making a home thereon, but with intent to acquire the valuable timber thereon for speculative purposes.

7. Defendant denies that at the time of complaint's alleged settlement on the said land, or at any time since the 21st day of June, 1901, the same was vacant, unoccupied or unappropriated public land of the United States, or free

from claim of right or title; and denies that at the time of such alleged settlement, or at any time after the 21st day of June, 1901, there was no evidence upon the said land, or in the United States Land Office of the District in which said land was and is situated, to-wit: In the United States District Land Office at Coeur d'Alene, Idaho, or in the General Land Office at Washington, D. C., showing that said land was claimed by this defendant, or that the boundaries of said land had not then been traced, marked or located by monuments; and alleges that on the contrary, the said land was at all times subsequent to the 21st day of June, 1901, segregated from the public domain and appropriated by the selection thereof made by this defendant as hereinafter set forth, and was therefore not open or subject to any other appropriation, entry or claim; that the fact of such selection, appropriation and segregation appeared upon the face of the records of the said United States Land Office at Coeur d'Alene, Idaho, and the records of the General Land Office at Washington, D. C., that the boundaries of the said land and the lines of survey thereof were duly and plainly traced and marked out upon the land and located by monuments long prior to the time when complainant went upon said land and made his alleged settlement thereon; that at the time complainant first went upon said land and at all times thereafter complainant had full knowledge and notice of the selection of said land by this defendant as hereinafter set forth, and of the segregation and appropriation of said land by virtue of such selection; and that complainant went upon said land and made his alleged settlement thereon, and thereafter occupied the same and made application to enter the same under the homestead laws, and endeavored to acquire title thereto, not in good faith, but well knowing of this defendant's prior selection thereof and in the hope that this defendant's claim to the land might be defeated on technical

grounds and that complainant might acquire said land and the valuable timber thereon for purposes of speculation.

8. Defendant alleges that on the 21st day of June, 1901, the land described in the bill of complaint was unsurveyed public land of the United States, non-mineral in character, not reserved, and to which no adverse right or claim had attached or been initiated; that the same was situated within the County of Shoshone and the State of Idaho, through which the railroad of the Northern Pacific Railroad Company was constructed and through which the same had been operated by said Railroad Company and by this defendant, as its successor, and was then being operated by this defendant; that said land was so classified as non-mineral at the time of actual Government survey; that on said 21st day of June, 1901, this defendant duly made selection of the said land under the provisions of the Act of Congress entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainer National Park," approved March 2, 1899 (30 Stat. L. 993), in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of said Act of Congress; that said selection was duly made by filing in the said United States Land Office at Coeur d'Alene, Idaho, a proper selection list or application to select, which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules, regulations and practice established and approved by the Secretary of the Interior and the Commissioner of the General Land Office; that said selection list properly and accurately described said land so selected, in such manner as to designate the same with a reasonable degree of certainty, as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selec-

tions; that said selection list was in all respects regular and proper in form and substance, and that the same was duly accepted, approved and allowed by the Register and Receiver of the said United States Land Office.

9. Defendant further alleges that on or about the 17th day of July, 1905, the official township plat of survey of the township in which the said land is situated was filed in the said United States Land Office at Coeur d'Alene, Idaho; and that shortly after said last mentioned date and within the time specified in said Act of Congress, this defendant caused to be made and filed in said United States Land Office at Coeur d'Alene, Idaho, in accordance with the provisions of Section 4 of said Act, a new selection list embracing the selections embraced in the said selection list of June 21, 1901, including the selection of the land described in the bill, describing the land so selected according to such survey; which said supplemental list was so made and filed in exact compliance and in accordance, in matters of form as well as substance, with the provisions of the said Act of Congress and the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office applicable to such selections.

10. Defendant alleges that prior to the time when complainant first went upon said land and the time when he made his alleged settlement thereon, the said land had been surveyed in the field by the official surveyors of the United States, under the direction of the Surveyor General and the Commissioner of the General Land Office; that the lines of survey and the boundaries of said tract of land were properly and plainly marked out upon the land by monuments, blazes and other marks; that the said survey so made was thereafter approved by the Surveyor General of the United States and the Commissioner of the General Land Office, according to law; that the lines of survey so traced and marked are identical with the lines of survey

shown on the township plat of survey filed as aforesaid; and that the said lines of survey, and the boundaries of the said tract of land as established and defined thereby, were well known to complainant at the time complainant went upon said land and made his alleged settlement thereon and at all times thereafter.

11. Defendant denies that at the time its said selection list was so filed the description of the said land contained in said selection list was imaginary, and denies that the description contained in said selection list was insufficient to designate, locate or describe the lands so selected, and alleges that in and by said selection list the said land was properly and sufficiently described, in such manner as to designate the same with a reasonable degree of certainty, in the manner prescribed and required by the said Act of Congress and by the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to selections under said act.

12. Defendant admits that shortly after the township plat of survey was filed in the said United States Land Office at Coeur d'Alene, Idaho, as hereinbefore set forth, complainant tendered to the Register and Receiver of said Land Office an application to enter the said land under the homestead laws of the United States; that such application was rejected by said Register and Receiver; and that thereafter the action of said Register and Receiver in so rejecting said application was confirmed by the Commissioner of the General Land Office and by the Secretary of the Interior; but defendant has no knowledge or information sufficient to form a belief as to whether or not such application to enter said land was made by complainant in the form and manner required by law, or in compliance with the rules, regulations and practice of the General Land Office or of the Department of the Interior governing such applications; and alleges that the action of the said Register and Receiver

in so rejecting such application, and of the Commissioner of the General Land Office and the Secretary of the Interior in so confirming such rejection, was right and proper and in accordance with law, and not in violation of any right of complainant; and defendant further denies that the decisions of said officers were based upon an erroneous construction of the law and upon a state of facts concerning which there was and is no conflict or dispute, and alleges, on the contrary, that the decisions of said officers were based upon questions of mixed law and fact.

13. Defendant alleges that the said selection so made by the defendant Railway Company of the land described in said bill of complaint, and the said selection lists so filed by it were thereafter duly approved and allowed by the Commissioner of the General Land Office and by the Secretary of the Interior, pursuant to and as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; and that thereafter, and at or about the time stated in said bill of complaint, a patent of the United States conveying the said land to this defendant was duly issued, granted and delivered to this defendant in accordance with law.

14. Defendant admits and alleges that after the 21st day of June, 1901, and prior to the time when complainant first went upon said land, this defendant entered into an agreement with the defendant Edward Rutledge Timber Company, whereby this defendant, for a valuable consideration paid to it by said defendant Timber Company, sold the said land to said last named defendant, and undertook and agreed to convey the same to it by warranty deed; and that thereafter this defendant did duly convey the said land to said defendant Timber Company, by warranty deed dated the 11th day of February, 1911.

WHEREFORE, Defendant prays that it be hence dismissed, with costs.

NORTHERN PACIFIC RAILWAY COMPANY,
By R. H. Relf, Asst. Secy.
(Corporate Seal.)

Edward J. Cannon,
C. W. Bunn,
Charles Donnelly,
Grafton Mason,
Stiles W. Burr,
R. L. Black,
Solicitors and of Counsel for Defendant.

State of Minnesota,
County of Ramsey.—ss.

R. H. Relf came before me personally and being duly sworn on oath deposes and says that he is the Assistant Secretary of the above named defendant Northern Pacific Railway Company and authorized to make this affidavit in its behalf, that he has read the foregoing answer, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and that as to such matters he believes it to be true.

R. H. RELF.

Subscribed and sworn to before me this 29th day of August, 1912.

(Notarial Seal) W. F. VAN DEYN,
Notary Public, Ramsey County, Minnesota.
My Commission Expires May 11, 1913.

(Endorsed): Filed Sept. 26, 1912, A. L. Richardson, Clerk.

Replication to Answer of Edward Rutledge Timber Company.

In the District Court of the United States, for the District of Idaho, Northern Division.

In Equity.

ANDREW WEST,

Complainant,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Replication to Answer of Defendant, Edward Rutledge Timber Company.

Comes now Andrew West complainant in the above entitled cause, and replying to the answer filed herein says that, saving and reserving all manner of exceptions to the insufficiency of the answer, for replication thereto doth say.

That his bill is true and sufficient as averred, and that he is ready to prove it, and that the answer of the defendants is untrue and insufficient.

WHEREFORE, He prays relief as set forth in his original bill.

A. H. KENYON,
H. W. RICH,
JOHN WOURMS,
Solicitors for Complainant.

P. O. Address: 828 Old National Bank Bldg., Spokane, Spokane County, Washington.

(Endorsed): Filed October 15, 1912, A. L. Richardson, Clerk.

By Lawrence M. Larson, Deputy Clerk.

Replication to Answer of Northern Pacific Railway Company.

In the District Court of the United States, for the District of Idaho, Northern Division.

In Equity.

ANDREW WEST,

Complainant,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Replication to Answer of Defendant Northern Pacific Railway Company.

Comes now Andrew West complainant in the above entitled cause, and replying to the answer filed herein says that, saving and reserving all manner of exceptions to the insufficiency of the answer, for replication thereto doth say.

That his bill is true and sufficient as averred, and that he is ready to prove it, and that the answer of the defendants is untrue and insufficient.

WHEREFORE, He prays relief as set forth in his original bill.

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In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and EDWARD RUTLEDGE TIMBER COMPANY,

Defendants.

Stipulation.

The final decree having been entered herein dismissing the Bill of Complaint, and the complainant being about to sue out an appeal to the Circuit Court of Appeals for the Ninth Circuit, from said final decree.

IT IS NOW STIPULATED and AGREED by and between the parties hereto by their respective solicitors, that subject to the approval of the Judge of said court the following shall be taken and considered as the abstract of the evidence in said cause, for the purposes of such appeal, and that the said abstract may be submitted to the Judge of said court upon this stipulation for approval without notice.

A. H. KENYON,
SEABURY MERRITT,
Solicitors for Complainant.
C. W. BUNN,
E. J. CANNON,
JAMES B. KERR,
Solicitors for Defendant Northern Pacific Ry. Co.
STILES W. BURR, and
JAMES B. KERR,
Solicitors for Defendant, Edward Rutledge Timber Co.

In the District Court of the United States, for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and EDWARD RUTLEDGE TIMBER COMPANY,

Defendants.

Abstract of Evidence.

The complainant Andrew West was called as a witness in his own behalf, and testified:

I was born in Finland. Am thirty-seven years of age, a naturalized citizen of the United States; that since the 15th day of May, 1903, I have been residing on the land in controversy; on the 15th day of May, 1903, I bought the cabin, improvements and rights of John Hanson upon said land for $200.00, and have continuously resided thereon since that time; that I have been off of said lands to work for the purpose of earning some money for periods of one to two months; that I have had no other home or place of residence since that time; at that time there was about fifty square feet of clearing and a little cultivation; there were notices at each corner and a blazed line on all sides of said land at that time; I wrote and posted new notices at the corner of said land. During 1903 I made improvements upon said land by fixing up the house, making a trail and clearing more land; that since said time I have continued to clear additional land during each year and have cultivated and grown crops upon said land during each of said years; I have two and one-half acres in cultivation and four and one-half acres cleared; that I have a barn, house, woodhouse, roothouse and toilet, and fruit trees planted and growing upon said land; the reasonable value of my im-

provements thereon is the sum of $2800.00; it is a very rich dark brown soil and about one hundred (100) acres is suitable for cultivation; the land is covered with all kinds of trees, consisting of white pine, tamarack, yellow pine and seedlings, which timber is valuable as saw-timber; I found the foundation of an old cabin on the southeast quarter and two notices signed by Teat; there were no other blazes or notices of any kind upon said land; I never was informed that the defendants were claiming this land until I tendered my homestead application at the Coeur d'Alene Land Office; that the nearest place where I could trade was at St. Joe, which was twenty-eight miles.

Cross Examination.

I was born in Finland and came to this country January 1, 1901, direct to Wallace, Idaho. I worked in Wallace until the 10th day of May when I went on this homestead; I was looking for land and met John Hanson in Wallace; he was sick and had no money; he told me he would sell for $200.00; he took me to the land and showed me the notice at the southeast corner, and we went along the blazed line a half a mile north and found a notice on that corner, and we turned a half mile west and there was a notice on that corner; we went a half mile south and found a notice there, and then went half a mile east and came to the same corner, and it was blazed all around that square; the notices were dated May, 1902, and signed John Hanson; he did not show me any corners or government lines that had been made by Government surveyors; I looked all over the land to see if anybody else had found it and I did not see any evidence that any other person claimed it. The Hanson house was 14 by 15 feet inside with one window; I built a new house in 1905 and am using the Hanson house for a barn; I declared my intention to become a citizen and took my first papers in the court house at Wallace in April, 1903, and received my citizen papers in Coeur d'Alene on the 17th day

of June, 1905; Hanson left the land on the 15th day of May, 1903, and went to Spokane to see a doctor; I remained on the land until the fall of 1904, except when I went to St. Joe and St. Maries for mail and supplies; during each trip I was never gone away from the land longer than three weeks; I might have been out fifteen or twenty times during that time, and when I could not get a pack horse to carry in supplies I packed them in myself; Ferrell and St. Joe are the two different names for the same post office, which has been my post office all of the time; my house furnished is worth a thousand dollars; the furniture is worth $200.00 and the house $800.00; the house I bought from Hanson is worth $150.00; the root house is worth $100.00; the wood house is worth $50.00; the clearing of the land is worth $300.00 an acre, and I have cleared two and a half acres; I raised eight sacks of potatoes last fall and about a hundred pounds of rutabagas and about a hundred pounds of turnips; I sold about fifty pounds of potatoes last year for three cents a pound. I am not married. When I am off the land I go to Wallace most of the time. If I could not get any outside work I go and work in the mines for a month or two. I left the land after Christmas, in 1904, and worked January and February to the middle of March cutting cord wood between Wallace and Wardner on the hills there; I had a contract for 200 cords; I have stayed on this land all through some winters and the snow is from five to seven feet deep, being seven feet this last winter, the deepest I ever saw it; in the middle of winter I can get in to and out from the land. The land is good farming land and anything grows fine on it; this land will be worth just as much after the timber is off as it is with the timber on; I could clear ten or fifteen acres a year if I had a little money to buy a little powder to shoot the stumps out and a team of horses, but I am compelled to spend the little money I earn to pay the expenses and attorneys to prevent the Lumber Company from taking the land from me; I took a stone and

timber claim in 1906 which I paid for and now own, which consisted of 160 acres, described as the northwest quarter of section 26, township 45 north, range 3 east, B. M.; I got $3000.00 from my father's estate in 1905 which I loaned my brother and he bought 160 acres of land in Clarke county, Washington.

Re-Direct Examination.

When the official survey was made the surveyed lines running east and west were 40 rods from my old blazed lines and I was moved 40 rods west after the government survey and about 4 or 5 rods south.

Re-Cross Examination.

The government surveyors ran the north and south line between sections 20 and 21 on July 3, 1903, and I was right there. I was working right there when they came with the line and I got a map down so that I know when the land got surveyed. I never saw the surveyors run any other lines. I was busy working on clearing land, etc. The government surveyors were camped there on Marble Creek about a mile from my house for about a week.

JOHN DAVEGIO, a witness called and sworn on behalf of the complainant, testified as follows:

I am 66 years old; I have resided on Marble Creek for the last twelve or fifteen years on my homestead, which is about two miles distant more or less from Andrew West and is in section 16; I first met Andrew West in May, 1903, when he stopped at my place over night; I was first on his homestead in June 1903; there was a small clearing around his house; he was fixing his house that day; I was there again in September of that year; he was cutting brush and clearing; his garden was growing; he would come to my house often as it was on the trail and whenever a settler went out he would bring in everybody's mail and West would get his at my

place; I have seen Mr. West there during all of the years since 1903 until the fall of 1912; he has built a nice comfortable house in which he has the necessary furniture, also a wood house, root house, and some fence around the place; the land is good soil and good for cultivation when the timber is cleared and most of it can be cultivated. I have proved up on my homestead and have no interest in the result of this litigation.

Cross Examination.

I have proved up and sold out and gone away. I have stayed in there part of the winter sometime, not all the winter; I stayed there late in December many times, and I used to pull out during the December snow there.

Re-Direct Examination.

The first time that I ever heard that the defendants were clearing this land was when we came down to Coeur d'Alene to file in 1905.

Q. Did you ever make any inquiry at the Land Office to ascertain whether there was any claim against this land at any time?

A. I did.

Q. When was that?

COUNSEL FOR DEFENDANTS: You are inquiring as to the West land?

COUNSEL FOR COMPLAINANT: I will not limit it to that; to the lands on Marble Creek in the vicinity of this land including this land.

COUNSEL FOR DEFENDANTS: It seems to me that it is both immaterial and incompetent. He was on section 16, which was a state section and what the land officer told him about the southeast quarter of 20, in controversy with West, is certainly not admissible.

COUNSEL FOR COMPLAINANT: No, but as to this

land in this vicinity in general including this and other land.

COUNSEL FOR DEFENDANTS: All the more immaterial.

The COURT: I am not so clear that it would be material, but I shall overrule the objection and let it go in.

A. Yes, I did.

COUNSEL FOR COMPLAINANT: When was that?

A. That was in 190, in August sometime.

Q. Where did you go and what conversation did you have?

A. I made inquiry of the receiver in the land office here if there was anything against the land up in Marble Creek and I gave him the best description I could and asked him if any claims were being made to that land, and he looked at the record and told me there was nothing on record and said "the land is unsurveyed and subject to squatters' right. The government will protect you until it is surveyed."

I know John Hanson located on the West claim and was living there in the summer of 1902.

COUNSEL FOR DEFENDANTS: I assume, your Honor, that it is understood that all this testimony goes in under the objection which has been made?

The COURT: Yes.

OLAF EDIN, a witness called and sworn on behalf of the complainant testified as follows:

I am now and have been since 1901 living on Marble Creek in section 32, about two miles from Andrew West homestead; I have known Andrew West since the middle of the summer 1903; I was on his homestead in 1901 before anybody was living there, and was there in 1902 when John Hanson was living there; he had a cabin and a little clearing. I have been on West's homestead every year since 1903; the improvements continued to be better and the clear-

ings enlarged. I have seen Mr. West a number of time on his place, my place or on the trail since 1903; there has been a crop raised on the West homestead every year since that time and West has made his home there. His home was furnished and is as good as the average homesteader's house. He built his new house in 1905; it is well furnished, plastered, and papered; there are three or four acres cleared, and probably two acres in cultivation; I have never known of or seen any blazes, lines, monuments, notices, or anything that would indicate that the Railway Company or the Timber Company were claiming the West land by reason of having scripped it; there were no lines or evidences of a survey until the government surveyors came in there in 1903; the only lines prior to that were the blazed lines of the locators; these claims were all marked by having lines blazed around them; I helped run the lines around the West claim in 1901; there were no lines around it or notices posted upon it prior to that time; the line I blazed around this cabin varied from the survey about a quarter of a mile, or nearly a quarter one way, and the other way a few rods.

Cross Examination.

In running these lines we started at Marble Creek; we did not know where we were; we just started and made a certain point and started from there; we paced out these quarter section lines so that they would not be crooked, and we undertook to tie them up to the government lines which had already been run as near as we could. Of course it was an uncertain thing. The nearest government line that had been established when we started in to run these lines was distant about five miles; that line was the northeast corner of township 45, 44, 45, in 3 east, five miles from there; the southwest corner in that township was also set and the exterior lines of that township, 45-3, had been run, and we carried in our lines we carried them in from the south line

of township 45-3. We parcelled out these lands by quarter sections as near as we could bringing it to what would be the government survey but so as not to crowd settlers we might have made them a little larger than the government survey. I first heard about the Northern Pacific scrip in 1905 when I filed.

ANDREW WEST, the complainant, was thereupon recalled as a witness in his own behalf and testified as follows:

I did not own any land on the 17th day of July, 1905, when I made my application to file on my homestead; I made my stone and timber application in the fall of 1906. My brother bought the land in Clarke county, Washington, from Mr. Briggs for $3000.00. I paid for it for him and it was deeded to me for security on September 28, 1908, and I conveyed it to my brother in April, 1912.

W. H. BATTING, called and sworn on behalf of the complainant, testified as follows:

I am the register of the United States Land Office at Coeur d'Alene. I have two tract books here; I have the old tract book and the new tract book transcribed in 1912; the loose leaf tract book is now the official tract book of the office; this was transcribed after our fire of 1911 on account of the condition of the old tract book.

COUNSEL FOR COMPLAINANT: Q. From either of these tract books can you ascertain whether any lands included therein have been classified as mineral or nonmineral in character?

A. Yes.

COUNSEL FOR COMPLAINANT: Q. Does the tract book show any classification as to section 20, township 44 north, range 3 east?

A. No, sir, the even sections are not classified.

COUNSEL FOR COMPLAINANT: Q. Were any even

numbered sections classified in the survey of that township?

A. I cannot answer that at present. I would have to get other records. I will say this though that I have noticed frequently in the record books that entries have been made of classifications of even sections, but I have always disregarded them because they are of no effect.

COUNSEL FOR COMPLAINANT: Q. What?

A. Because they have no effect whatever as to the status of the land.

COUNSEL FOR COMPLAINANT: Q. From the records in your office Mr. Batting, can you determine whether or not any classification as to mineral or nonmineral character has ever been made of this section 20 referred to?

A. Not at present, no. I used to have the original reports of the Commissioner, but they have been destroyed by fire. The official records would now have to be obtained from the General Land Office; that is, that applies to all the classifications in this district made by the Commissioner.

COUNSEL FOR COMPLAINANT: Q. From the records in your office has section 20, township 44 north, range 3 east, B. M., ever been classified as to the mineral or nonmineral character?

A. No, sir.

Cross Examination.

COUNSEL FOR DEFENDANTS: Q. Are you able to ascertain from an examination of the records in your office whether this section or any other even numbered section in that township has or has not been examined and classified by the department with respect to mineral or nonmineral character?

A. No, sir; I would like to explain that I could prior to the fire which destroyed our office in 1911, but not now.

Q. I will ask you to state whether or not it is a fact that the even numbered sections are classified as appears from those records and the odd numbered sections are not?

A. Just the reverse is true.

Q. The odd numbered sections are classified and the even are not?

A. Yes.

Q. But they do classify the odd numbered sections?

A. That is correct.

Q. And do not the even numbered sections; then I will ask you to state whether or not it is a fact that the record is silent upon the subject because the even numbered sections are in no event classified?

A. That is correct; I can explain to you a little further; In the old tract book of our office the classification of 44-3 east was entered at the beginning of the head of a township classified October, 1899, as mineral, approved March 26, 1901, and refers to General Land Office letter. That is the only entry in 44-3 East with reference to mineral or non-mineral classification.

Q. Now I will ask you to state if it is not a fact that the odd numbered sections of that township in your new record are classified as mineral?

A. Yes, all of them. I was going to explain when I started my explanation that the reason that was entered in the beginning of the township was because the classification applies only to odd sections.

COUNSEL FOR DEFENDANTS: The classification you speak of is the classification under the act of February 26, 1895?

COUNSEL FOR COMPLAINANT: We admit now that the records do not show that there was a classification of section 20.

Q. Then the fact that on these records here there is no classification with respect to section 20 does not indicate that there was no return or classification by the surveyor general in connection with the survey?

A. Oh, no; the surveyor general makes a return with respect to every survey, every section.

Q. With respect to whether it is mineral or not?

A. Yes.

Q. And you do not mean to be understood to testify that the records of your office indicate that there was no return on this section?

A. No, not at all.

Re-Direct Examination.

Q. Is there any way for you to tell from any record in your office as to whether the section of land in controversy has ever been classified by the surveyor general?

A. Not in my office at present; I can explain that that when the office was destroyed in 1911 we had those records and after the fire in re-establishing the office I requested that they be duplicated and the surveyor general has done part of the work but not completed it. This particular township has not been duplicated. I have no records of any classification of the original survey of the surveyor general. If I had the field notes I could give you that; they were destroyed by fire. No records of the tract books to which I have referred have been made up from the official plat and the official notes which I had in my office; the surveyor's return as to the character of the land was never entered in the tract book.

NEWTON J. GLOVER, called and sworn as a witness in behalf of the complainant, testified as follows:

I have resided on Marble Creek since 1901; I have known Mr. West since 1903; my homestead is the west half of the northwest quarter of the same section in which Mr. West's homestead is; I first saw him on his homestead in 1903; he was putting in his garden; he has made that his home since that time; he has raised a crop there each year since 1903; I never heard that the Railroad Company claimed this land prior to 1905; I went to the land office in July, 1901, and

made inquiry as to this land; there was nothing in the record about it; it was open for homestead settlement.

JOHN STEVENSON, called as a witness on behalf of the complainant testified as follows:

I live in section 29 adjoining the section in which Mr. West lives; the West land is good agricultural land after it is cleared; there could be 120 acres of it cultivated and farmed.

Defendants' Evidence.

LLOYD E. GILHAN, called as a witness on behalf of the defendants, testified as follows:

I reside in Portland, Oregon; am a timber cruiser and engineer; I have been engaged in the woods in this capacity since 1906, and am familiar with the location of government corners and lines, the taking of elevations and the cruising of timber; in April, 1913, I spent one day on the land claimed by Andrew West, the southeast quarter of section 20, township 44 north, range 3 east, B. M., and spent from April 9 to April 29, inclusive, upon this land and other land in the same vicinity; I made a survey of the southeast quarter of section 20 and took elevations, and by using an aneroid barometer I took the elevations of this land; I prepared the plat marked "Defendants' Exhibit No. 3," which shows the east half of section 20 and the west half of section 21, township 44 north, range 3 east, B. M.; this map correctly shows the elevations of the various points and subdivisions of lands shown on the map; the contour lines on this map are 50 feet apart, that is, each line is 50 feet higher or 50 feet lower than the next line; the highest point shown on the southeast quarter of section 20 is 3650 feet; this point is in the northeast quarter of the southeast quarter of section 20, and the lowest point is an elevation of 3,000 feet, giving a difference in elevation of 650 feet; the distance between the highest

point and lowest point laterally is 1980 feet; the west half of the southeast quarter of section 20 is steep, while the east half of the southeast quarter is practically level; the slope of the ground on the southeast quarter of section 20 runs from ten to forty-five degrees; the land is pretty heavily timbered; it is timbered with white pine and tamarack. In April, 1913, the land was covered with snow from four feet to twenty-five feet deep.

The following documentary evidence was introduced at the hearing of said cause:

There was introduced as COMPLAINANT'S EXHIBIT NO. 1, documents certified as copies by the commissioner of the General Land Office as follows:

1. Homestead application of ANDREW WEST, for the SE¼ of Sec. 20, Twp. 44 North, Range 3 E., B. M., dated July 15th, 1905.

2. Affidavit of ANDREW WEST, under Act of Congress of August 30, 1890, in support of his homestead application, dated July 17, 1905.

3. Homestead affidavit of ANDREW WEST, dated July 17, 1905, in support of his homestead application.

4. Non-mineral affidavit of ANDREW WEST, dated July 17, 1905, in support of his homestead application.

5. Affidavit of ANDREW WEST, dated July 17, 1905, under Section 2289 of Revised Statutes of the United States, in support of his homestead application.

There was introduced as PLAINTIFF'S EXHIBIT NO. 2 documents certified as copies by the Commissioner of the General Land Office, as follows:

1. Rejection of Homestead Application of ANDREW WEST in words and figures as follows, to-wit:

"01261

Coeur d'Alene, Idaho, August 16th, 1905.

Andrew West,

St. Joe, Idaho.

Dear Sir:

Your application to make entry of SE¼ Sec. 20, Tp. 44 N., R. 3 E., B. M., under the homestead law has been rejected for the reason that all of the lands applied for is embraced in the prior N. P. Ry. Co. list No. 61, Act March 2, 1899, filed June 21, 1901.

Thirty days from the above date are allowed you in which to appeal from the rejection of said application.

Yours truly,

Register."

2. *Letter of Authorization,* in words and figures as follows, to-wit:

"UNITED STATES LAND OFFICE,

Coeur d'Alene, Idaho. 01261

Andrew West,

vs.

Northern Pacific

Railway Co.—Authorization.

I, Andrew West do hereby authorize Messrs. Peacock, Wells & Ludden, to appear and represent me as my attorneys in all matters and things connected with the above entitled case.

ANDREW WEST."

3. *Notice of Appeal* by Peacock, Wells and Luddon, attorneys for Andrew West, to the Commissioner of the General Land Office from the rejection by the Register and Receiver of the Coeur d'Alene Land Office of the Homestead Application of Andrew West.

4. *Affidavit of Service* of Notice and Appeal on Northern Pacific Railway Company.

5. *Letter* from Register of Coeur d'Alene Land Office to Commissioner of General Land Office transmitting appeal of Andrew West from rejection of his homestead application.

6. *Petition* addressed to Secretary of Interior by Andrew West for a review and reconsideration of the decision of the Secretary of the Interior rendered July 24, 1898, adverse to Andrew West, signed by Andrew West and A. G. Kerns, his attorney.

7. *Affidavit* of good faith by Andrew West in support of his petition for review of decision of Secretary of Interior dated December 22, 1908.

8. *Supplementary Affidavit* by Andrew West dated April 20, 1909.

9. *Letter* from Commissioner of the General Land Office addressed to Secretary of Interior transmitting motion of West for review of Departmental Decision dated July 24, 1908.

10. *Letter* from Assistant Commissioner of General Land Office, dated April 29, 1909, to Register and Receiver, Coeur d'Alene, Idaho, stating that a motion for review has been filed in case of Andrew West versus Northern Pacific Railway Company, and directing Register and Receiver to suspend action in the same.

11. *Letter* dated April 29, 1909, from Commissioner of General Land Office to Secretary of Interior, transmitting motion for review of Departmental Decision dated July 24, 1908.

12. *Letter* dated May 13, 1909, from Commissioner of General Land Office to Hon. W. B. Heyburn, setting forth the status of the land covered by Homestead Application of Andrew West rejected for conflict with a prior selection of the tract by the Northern Pacific Railway Company.

13. *Letter* dater May 24, 1909, from Butler and Vale, attorneys, enclosing affidavit and petition for review of Andrew West involving land covered by Homestead Application of West.

14. *Letter* from First Assistant Secretary of Interior to Commissioner of the General Land Office, in words and figures as follows, to-wit:

"K. M. T. 281730-18 G. B. G.
D-7138.

DEPARTMENT OF THE INTERIOR
WASHINGTON.

June 9, 1909.

Andrew West,
v.
Northern Pacific Railway Co.

Motion for Review—Entertained.

Coeur d'Alene 01261
F.

The Commissioner of the
General Land Office.

RECEIVED
JUN 11
1909.

Sir:

This is a motion on behalf of Andrew West for review of so much of departmental decision of September 5, 1908, (erroneously described in the motion as departmental decision dated July 24, 1908,), as affirmed your office decision of January 5, 1907, holding that the right of the Northern Pacific Railway Company to select certain unsurveyed lands described in its lists Nos. 61, 63 and 65, and adjusted to the line of the public surveys, when made, was superior to that of the homestead claimant, West, involving the SE¼ Sec. 20, T. 44 N., R. 3 E., Coeur d'Alene land district, Idaho.

Upon careful consideration of the motion it appears that sufficient ground is shown for entertaining the same. I

therefore herewith transmit said motion and direct that the same be returned to West, notifying him that it will be considered, provided he will serve upon the Northern Pacific Railway Company a copy thereof and all accompanying papers, together with a copy of this order, and return the papers with evidence of service, within thirty days from receipt hereof.

In entertaining this motion the Department desires to hear argument mainly upon two propositions: (1) the alleged insufficiency of description of the base lands upon which original selections herein rested; and (2) the allegations that a new base was substituted after the original selection was made, and after West had initiated his settlement claim to said land.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

15. *Letter* dated June 25, 1909, from Assistant Commissioner of General Land Office to Register and Receiver directing service of motion for review on Northern Pacific Railway Company.

16. *Letter* dated January 5, 1910, from Kerns and Ryan, attorneys, addressed to Register and Receiver, Coeur d'Alene, Idaho, enclosing proof of service of motion for review on Northern Pacific Railway Company.

17. *Affidavit* of John F. Moffatt, dated January 5, 1910, showing service of petition for review on Northern Pacific Railway Company.

18. *Letter* dated January 10, 1910, from Receiver of Coeur d'Alene Land Office to Commissioner of General Land Office, transmitting proof of service of motion for review on Northern Pacific Railway Company.

19. Argument filed in United States Land Office at Coeur

d'Alene, Idaho, on January 28, 1910, by Kerns and Ryan, attorneys for Andrew West, in support of petition for rehearing addressed to the Secretary of the Interior.

20. *Affidavit* of A. T. Ryan, dated January 26, 1910, showing service of argument in support of petition for rehearing on Northern Pacific Railway Company.

21. *Letter* dated January 31, 1910, from Receiver of Coeur d'Alene Land Office to Commissioner of General Land Office transmitting argument on rehearing filed in Coeur d'Alene Land Office on January 28, 1910, by Kerns and Ryan, attorneys.

22. *Letter* dated February 5, 1910, from Assistant Commissioner of General Land Office to Secretary of Interior returning record in the case of Andrew West versus Northern Pacific Railway Company as directed by departmental letter of June 9, 1909.

23. *Letter* dated February 5, 1910, from Acting Assistant Commissioner of the General Land Office to Register and Receiver, Coeur d'Alene, advising that record in case of Andrew West versus Northern Pacific Railway Company has been forwarded to the Department on motion filed for review of departmental decision of September 5, 1908.

24. *Letter* dated February 5, 1910, from Acting Assistant Commissioner of General Land Office to Butler and Vale, notifying them that record in case of Andrew West versus Northern Pacific Railway Company has been forwarded to the Department on motion filed for review of departmental decision of September 5, 1908.

25. *Letter* dated February 5, 1910, from Acting Assistant Commissioner of General Land Office to Messrs. Britton and Gray, advising them that record in case of Andrew West versus Northern Pacific Railway Company has been forwarded to the Department on motion filed for review of departmental decision of September 5, 1908.

26. *Letter* dated February 18, 1910, from Assistant Commissioner of General Land Office to Secretary of Interior transmitting letter of Receiver of Coeur d'Alene Land Office of January 31, 1910, enclosing brief filed on behalf of West.

27. *Letter* dated February 23, 1910, from Britton and Gray, to Secretary of Interior, filing reply brief on behalf of the Northern Pacific Railway Company in the case of Andrew West versus said company.

28. *Brief* filed by Britton and Gray, attorneys for Northern Pacific Railway Company, in case of Andrew West versus Northern Pacific Railway Company on motion for review by West of the decision of the Secretary of Interior of July 24, 1908.

29. *Affidavit* of Edward Jackson dated February ....., 1910, showing service of reply brief on A. G. Kerns, attorney for Andrew West.

30. *Letter* from First Assistant Secretary of the Interior to the Commissioner of the General Land Office, dated February 16, 1910, which letter is in words and figures as follows, to-wit:

281730—46

LLB. DEPARTMENT OF THE INTERIOR, G.B.G.
WASHINGTON.

Address only
The Secretary of the Interior. Mar. 16, 1910.
D-7138 FWC

Coeur d'Alene
01261

ANDREW WEST,
v.
NORTHERN PACIFIC RAILWAY CO.

Received
Mar 19 1910.
G. L. O.

Motion for Review Denied.

The Commissioner of the General Land Office.

Sir: This is a motion on behalf of Andrew West for review of departmental decision of September 5, 1908, sustaining the claim of the Northern Pacific Railway Company and rejecting the settlement claim of the said West, for the SE¼ Sec. 20, T. 44 N., R. 3 E., Coeur d'Alene land district, Idaho.

This case is in all essential respects the same as the case of August Hanson et al v. Northern Pacific Railway Company, in which a motion for review, filed by Hanson, has been this day denied. For the reasons therein stated, the motion herein is denied, and the papers are herewith transmitted for the files of your office.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

31. *Letter* dated March 30, 1910, from Acting Assistant Commissioner of General Land Office at Butler and Vale, enclosing copy of departmental decision dated March 16, 1910, denying West's motion for review.

32. *Letter* dated March 30, 1910, from Acting Assistant Commissioner of General Land Office to Messrs. Britton and Gray, enclosing copy of decision dated March 16, 1910, denying West's motion for review.

33. *Letter* from Assistant Commissioner of General Land Office, dated March 30, 1910, to Register and Receiver of United States Land Office at Coeur d'Alene, Idaho, transmitting letter of Secretary of Interior of March 16, 1910.

34. *Election* of Andrew West to make proof, in words and figures as follows, to-wit:

"RECEIVED
Sept. 13, 1912 281730—5 01261
U. S. LAND OFFICE
COEUR D'ALENE, IDAHO.

ELECTION TO MAKE PROOF
UNDER LAW UNDER WHICH ENTRY WAS MADE.
Act of June 6, 1912 (Public, No. 179)

Marble Creek, Idaho,
Sept. 10th, 1912

Register and Receiver,
United States Land Office,
Coeur d'Alene, Idaho.

Sirs:

On the 17th of July, 1905, I made Homestead Entry No. ..... for S. E. ¼ Sec. 20, T. 44, N, R. 3 E., Boise Meridian.

Under the privilege allowed by Section 2291, U. S. R. S., as amended by the Act of June 6, 1912 (Public, No. 179), I hereby give notice that I elect to make proof on said entry under the law under which the same was made.

My postoffice address is St. Joe, Idaho.

ANDREW WEST.

There was introduced as PLAINTIFF'S EXHIBIT NO. 3 a document certified as a copy by the Commissioner of the General Land Office, being a selection list of the Northern Pacific Railway Company, which document is in words and figures as follows, to-wit:

ACT OF MARCH 2ND, 1899

Filed June 21, 1901
D. H. Budlong,
Register. Approved June 21, 1901.

LAND DEPARTMENT
NORTHERN PACIFIC RAILWAY COMPANY
List No. 61 (lieu)
OF SELECTIONS OF PUBLIC LANDS MADE BY THE NORTHERN PACIFIC RAILROAD COMPANY AS INURING TO IT UNDER GRANTS OF JULY 2, 1864, AND MAY 31, 1870, IN THE COEUR D'ALENE U. S. LAND DISTRICT IDAHO.

July 18, 1911	To H. W. Rich and John King by Acting Secy. copy hereto attached. Wood.	Posted July 22-1901 K. L. C. 9-20-10 Base Posted. Van D. o

a-2

LAND DEPARTMENT
NORTHERN PACIFIC RAILWAY COMPANY.
LIST No.
61.

STATE OF IDAHO.
U. S. Land Office at
Coeur d'Alene.

The Northern Pacific Railroad Company and the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, having executed and delivered to the United States their certain deed, dated July 19, 1899, conveying and relinquishing to the United States certain lands situated within the limits of the Mount Ranier National Park and the Pacific Forest Reserve, as defined by the Act of Congress entitled "An Act to set aside a portion of certain lands in the state of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," which Act

was approved March 2, 1899, in pursuance of said Act of Congress above mentioned, now, by virtue of the right conferred upon the said Northern Pacific Railroad Company by said Act of Congress approved March 2, 1899, the said Northern Pacific Railway Company as the successor in interest of the Northern Pacific Railroad Company, hereby selects the lands hereinafter specified in lieu of a like quantity of lands so relinquished and conveyed. The descriptions hereinafter set opposite the lands selected being assigned as the particular bases for the tracts hereby selected.

All the lands hereby selected are situated within the Coeur d'Alene land district, in the state of Idaho.

LIST OF LANDS north of base line and east of Boise Principal Meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," in lieu of lands set opposite thereto, relinquished under said act of March 2, 1899.

	Part of Section	Sec.	Town.	Range	Area Acres-100ths	Remarks
The following tracts of land which when surveyed will be described as follows:						
1	All	14	44	2	640	
2	All	22	"	"	640	
3	W½ NE¼, NW¼, W½ SW¼, SE¼ SW¼, and S½ SE¼	26	"	"	440	
4	W½	6	43	3	320	
5	E½	18	44	3	320	
6	All	20	"	"	640	
7	NE¼	30	"	"	160	
8	NE¼ SW¼ and S½ SW¼	30	"	"	120	
9	E½	32	"	"	320	
10	W½	32	"	"	320	
	TOTAL				3920	Acres

LIST OF LANDS RELINQUISHED to the United States by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and specified as bases for the particular tracts set opposite and hereby selected.

Part of Section	Sec.	Town. North	Range East W.M.	Area Acres-100ths	Remarks
The following tracts of land which when surveyed will be described as follows:					
1 All	31	18	8	640	
2 All	33	"	"	640	
3 S½ NE¼, W½ & NE¼ SE¼	29	"	"	440	
4 E½	35	"	"	320	
5 W½	35	"	"	320	
6 All	11	13	11	640	
7 NE¼	9	"	"	160	
8 NW¼ SE¼ & S½ SE¼	29	18	8	120	
9 W½	9	13	11	320	
10 S½	31	17	12	320	
	TOTAL			3,920	Acres

State of Minnesota,
County of Ramsey.—ss.

I, Wm. H. Phipps, being duly sworn, depose and say: that I am the Land Commissioner of the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company; that the lands described in the foregoing list, and which are hereby selected by the Northern Pacific Railway Company, under the Act of Congress approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and all of them, are vacant, unappropriated lands of the United States, not reserved, and to which no adverse right or claim has attached, and have been found, upon examination, to

to be non-mineral in character; and said lands, and all thereof, are of the character contemplated by said Act of Congress approved March 2, 1899; and that the specific lands heretofore relinquished and conveyed to the United States by said Northern Pacific Railway Company, as successor in interest of the Northern Pacific Railroad Company, in lieu of which the lands herein described are selected, are truly set forth and described in this list, and no selection has heretofore been made in lieu of any of the lands herein specified as the basis for the lands hereby selected.

WM. H. PHIPPS (Seal)

Subscribed and sworn to before me this 17th day of June, 1901. W. F. von Deyn. Notary Public, Ramsey County, Minnesota.

U. S. Land Office at Coeur d'Alene, Idaho,
Jun 21, 1901

We hereby certify that we have carefully examined the foregoing selection list filed by the Northern Pacific Railway Company, as the successor of the Northern Pacific Railroad Company, under the act of Congress approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and have critically examined the plats and records of this office, and that the lands selected appear by the records of this office to be subject to such selection; and said lands, and all of them, are public lands of the United States, not reserved, and to which no adverse right or claim has attached. We have therefore approved the foregoing list and the selection of the lands therein described, and have made due notation thereof upon the records of this office.

It is further certified that the foregoing list shows an assessment of the fees payable hereunder, and that said

Northern Pacific Railway Company has paid to the undersigned, the receiver, the full sum of fifty dollars in full payment and discharge of said fees.

D. H. BUDLONG, Register.
C. D. WARNER, Receiver.

The foregoing, Plaintiff's Exhibit 3, was also introduced in evidence by the defendants.

There was introduced as PLAINTIFF'S EXHIBIT NO. 4 a document certified as a copy by the Commissioner of the General Land Office, being a list filed by the Northern Pacific Railway Company describing anew the lands selected by Coeur d'Alene List No. 61 which exhibit is in words and figures as follows, to-wit:

ACT OF MARCH 2, 1899.
Describing anew the lands selected by
Coeur d'Alene List No. 61 (In part)
so as to conform with the United States Survey thereof.
FORM L. D. 153

FILED JULY 31, 1905. Approved.....

LAND DEPARTMENT
NORTHERN PACIFIC RAILWAY CO.
LIST NO. 61 (In part).
OF SELECTIONS OF PUBLIC LANDS MADE BY THE NORTHERN PACIFIC RAILWAY COMPANY
As inuring to it under Grants of July 2, 1864
and May 31, 1870, in the
Coeur d'Alene U. S. Land District
IDAHO.

Posted Dec. 16, 1905.

Sept. 21-05 S. W. M.
Item 10, Base Posted Van D. "C"
adj. to survey item 8—Noted Van D. o

WHEREAS, by authority granted by an Act of Congress

entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve as a public park, to be known as the Mount Rainier National Park," approved March 2nd, 1899, the Northern Pacific Railway Company, the successor in interest to the Northern Pacific Railroad Company, did on the 21st day of June, 1901, select in the United States District Land Office at *Coeur d'Alene*, Idaho, certain lands in *townships numbered 44 north, ranges 2 and 3 east*, Boise Meridian, as described in its *selection list numbered 61*, which said lands at the date of said selection were unsurveyed public lands; and

WHEREAS, by section four (4) of the Act of Congress hereinbefore referred to, it is provided that in case the lands selected thereunder be unsurveyed at the date of said selection, the company selecting the same shall within a period of three months after the lands so selected have been surveyed and plats thereof filed by said local land office, file a new list describing the lands selected according to the Government survey.

NOW THEREFORE, in conformity with this provision and for the purpose of so describing said lands selected that they will conform to the government descriptions thereof according to said survey, the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, does hereby describe anew the lands included in said selection list as follows, to-wit:

LIST OF LANDS north of base line and east of Boise principal meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as

the Mount Rainier National Park," in lieu of lands set opposite thereto, relinquished under said act of March 2, 1899.

Part of Section		Sec.	Town.	Range	Area Acres-100ths	Remarks
1	All	14	42	2	640	
2	All	22	"	"	640	
3	W½NE¼ NW¼ W½ SW¼ SE¼SW¼ & S½SE¼	26	"	"	440	
4						
5	E½	18	44	3	320	
6	All	20	"	"	640	
7	NE¼	30	"	"	160	
8	NE¼ SW¼	30	"	"	115.14	
9	E½	32	"	"	320	
10	W½	32	"	"	320	
					3595.14	

LIST OF LANDS RELINQUISHED to the United States by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and specified as bases for the particular tracts set opposite and hereby selected.

	Part of Section	Sec.	Town. North	Range East	Area Acres-100ths	Remarks
Those certain tracts of land which when surveyed will be described as follows:						
1	All	31	18	8	640	
2	All	33	"	"	640	
3	S½NE¼ W½ & NE¼ SE¼	29	"	"	440	
4						
5	W½	35	18	8	320	
6	All	11	13	11	640	
7	NE¼	9	"	"	160	
8	NW¼SE¼ & S½ SE¼	29	18	8	120	
9	W½	9	13	11	320	
10	E½ SW¼	27	15	11	80	
	N½SW¼ SW¼SW¼ N½SE¼ & SE¼SE¼	33	"	"	240	

The foregoing list designating anew so as to conform with the public surveys thereof the lands selected in

Coeur d'Alene List No. 61 (in part)

was filed in this office by the Northern Pacific Railway Company on the 31st day of July, 1905.

R. N. DUNN,
Register.
C. D. WARNER,
Receiver.

The foregoing Complainant's Exhibit 4 was also introduced in evidence by the defendants.

Thereupon the plaintiff offers in evidence a document in words and figures as follows, to-wit:

COMPLAINANT'S EXHIBIT NO. 7.

No. 552

B 4-207 Filed June 9, 1913
CRGO A. L. Richardson,
Clerk.

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE.

WASHINGTON, D. C., May 6, 1913.

I hereby certify that the annexed copy of letter is a true and literal exemplification from the original in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

FRED DENNETT,
Commissioner of the General Land Office.

(United States General Land Office Seal.)

In reply please refer to Coeur d'Alene 01261 "C" RSC

R S C J H D
F R D
D K P

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

WASHINGTON, May 6, 1913.

Address only the
Commissioner of the
General Land Office.

Mr. A. H. Kenyon,
827 Old National Bank Building,
Spokane, Washington.

Sir:

Hon. W. E. Borah, United States Senate, has left at this office a letter which you addressed him April 25, 1913. You

transmitted to Mr. Borah with your letter certified copies of certain papers identified by this office as Coeur d'Alene 01261.

You state that you desire the Commissioner of this office to execute a certificate to be attached to these papers, stating in substance, that they are copies of the complete record in the case of Andrew West for the SE¼ Sec. 28, T. 44 N., R. 3 E., B. M., Idaho.

This office is authorized by statutes to furnish certified copies of books, records, papers, documents, maps, plats, etc., but cannot certify to facts or conclusions. Obviously, it could not certify that a rertain record contained all papers which may have been considered by the Secretary of the Interior in the adjudication of a case. It may be stated, however, that the copies furnished you were certified copies of all the papers in the case which are found in the general files of the office.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

5-6-VEW

Thereupon counsel for the defendants interposed the following objection:

"This is objected to upon the ground that it is immaterial, incompetent, and not evidence of the facts therein stated. This is a letter, if your Honor please, addressed to the attorneys for the plaintiff. It says 'This office is authorized by statute to furnish certified copies of books, records, papers, documents, plats, etc., but cannot certify as to facts or conclusions. Obviously it could not certify that a certain record contained all papers which may have been considered by the Secretary of the Interior in the adjudication of the case'."

Thereupon the objection of defendants' counsel was overruled and said document was received in evidence.

Documentary evidence was introduced at the hearing on behalf of the defendant as follows:

That certain plat referred to in the testimony of the witness LLOYD GILHAM contained in the foregoing abstract, which was marked DEFENDANT'S EXHIBIT 3, the original of which is returned herewith.

There were also offered in evidence on behalf of the defendants certain decisions in the case of *August Hanson* versus *Northern Pacific Railway Company*, referred to in the decision of the Secretary of the Interior, of March 16, 1910, above set forth, rejecting the motion for review of Andrew West upon the ground that it was controlled by the decision in the case of August Hanson versus Northern Pacific Railway Company.

The decisions in the Hanson case certified as copies by the Commissioner of the General Land Office were marked "DEFENDANT'S EXHIBIT NO. 11," and are as follows:

1. *Letter* from First Assistant Secretary of the Interior to Commissioner of the General Land Office dated June 9, 1909, entertaining a motion for review, which letter is in words and figures as follows, to-wit:

K. M. T. 313136-1A G. B. G.

DEPARTMENT OF THE INTERIOR,

D-578 WASHINGTON. June 9, 1909.

August Hanson, et al.

v.

Northern Pacific Railway Co.

Motion for Review—Entertained.

RECEIVED
JUN 14
1909
G L O

Coeur d'Alene 01259
F

The Commissioner of the
General Land Office.

Sir:

This is a motion on behalf of August Hanson for review of so much of departmental decision of September 5, 1908 (erroneously described in the motion as departmental decision dated July 24, 1908) as affirmed your office decision of January 5, 1907 holding that the right of the Northern Pacific Railway Company to select certain unsurveyed lands described in its lists Nos. 61, 63 and 65, and adjusted to the lines of the public surveys, when made, was superior to that of the homestead claimant, Hanson, involving the W½ SW¼, NE¼ SW¼, and NW¼ SE¼, Sec. 21, T. 44 N., R. 3 E., Coeur d'Alene Land District, Idaho.

Upon careful consideration of the motion it appears that sufficient ground is shown for entertaining the same. I therefore herewith transmit said motion, and direct that the same be returned to Hanson, notifying him that it will be considered, provided that he will serve upon the Northern Pacific Railway Company a copy thereof and all accompanying papers, together with a copy of this order, and return the papers with evidence of service, within thirty days from receipt hereof.

In entertaining this motion the Department desires to hear argument mainly upon two propositions: (1) the alleged insufficiency of description of the base lands upon which the original selections herein rested; and (2) the allegation that a new base was substituted after the original selection was made, and after Hanson had initiated his settlement claim to said land.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

2. *Letter* dated March 16, 1910, from First Assistant Secretary of Interior to Commissioner of General Land Office, denying motion for review, which letter is reported in the decisions of the Secretary of the Interior in Volume 38, Land Decisions, at page 491.

There was also introduced as DEFENDANT'S EXHIBIT 8 a certified copy of a letter from the Commissioner of the General Land Office to the Register and Receiver at Coeur d'Alene, Idaho, dated January 25, 1907, rejecting the application of Andrew West, which letter is in words and figures as follows, to-wit:

"380-p. 40 313136-1x COPY
"F"

15-14579 DEPARTMENT OF THE INTERIOR
F I W GENERAL LAND OFFICE
WASHINGTON, D. C. January 5, 1907

Address only the
Commissioner of the General Land Office.

Register and Receiver,
Coeur d'Alene, Idaho.

Sirs:

The plat of survey of T. 44 N., R. 3 E., was filed in your office July 17, 1905, and on the following day the State of Idaho applied to select, per common school indemnity list No. 4, under section four of the act of July (8) 3, 1890, the E½ Sec. 18, NW¼ NE¼, Sec. 19, all Secs. 20 and 21, W½ SW¼ Sec. 22, W½ NW¼ Sec. 27, all Sec. 28, E½ SW¼, lot 4, and E½ Sec. 30, all Sec. 32, E½ Sec. 33, S½ NW¼ and S½ Sec. 34, which application you rejected because all the lands applied for are embraced in prior selections of the Northern Pacific Railway Company, per lists Nos. 61, 63 and 65. From said rejection the State appealed.

It appears that on June 21, 1901, while the land was unsurveyed said company selected the E½ Sec. 18, all Sec. 20, NE¼ SW¼, S½ SW¼ and NE¼ Sec. 30, and all Sec. 32, per list No. 61. July 1, 1901, selected all Sec. 21, W½ SW¼ Sec. 22, W½ NW¼ Sec. 27, all Sec. 28, E½ Sec. 33, S½ NW¼ and S½ Sec. 34, per list No. 63, and on July 2, selected the NW¼ NE¼, Sec. 19 and SE¼ Sec. 30, per list No. 65, all under the provisions of the act of March 2, 1899 (30 Stat., 597, 628).

A number of homestead applications were presented on the same day the township plat was filed covering lands embraced in the State's application, which were also rejected for conflict with the prior selection of the land by the railway company and from said rejection each applicant appealed, viz.,

George W. Hayes, NE¼ Sec. 18. Settlement and continuous residence alleged since June 1, 1903. Improvements $200.

* * * * * *

Andrew West, SE¼ Sec. 20. Settlement and continuous residence since June 15, 1903. Improvements about $300.

* * * * * *

August Hanson, W½ SW¼, NE¼ SW¼ and NW¼ SE¼ Sec. 21. Settlement and continuous residence since September 14, 1901. Improvements about $400.

* * * * * *

July 31, 1905, the company filed a new list No. 61 and on August 30, 1905, filed new lists Nos. 63 and 65 describing the selected tracts in accordance with the plat of survey as required by section 4 of the act of March 2, 1899, supra.

The company filed a motion to dismiss the State's appeal on the ground (1) that the same was not filed within the time prescribed by the Rules of Practice and (2) it did not describe the lands with sufficient accuracy for the com-

pany to know what particular tracts are included in the case.

Notice of the rejection of the State's application was sent by registered letter on July 27, 1905, and the appeal was filed August 31, 1905. Said appeal was therefore within time. Further, the lands were described as being in T. 44 N., R. 3 E. and while the particular tracts applied for were not designated, it was sufficient notice to the company of the adverse claim asserted by the State. The motion to dismiss is denied.

It is contended that the tracts here in question were classified as mineral lands, and that the company's selection thereof is invalid. It is further claimed in behalf of the State, that the State had an absolute prior right of selection of the lands under the act of August 18, 1894 (28 Stat., 372, 394), extending from the time of the Governor's request for the survey of the land until the expiration of sixty days from the filing of the township plat of survey.

This land is within the indemnity limits of the company's grant under the act of July 2, 1864 (13 Stat., 365), and while unsurveyed it was classified as mineral land by the Board of Land Commissioners appointed under the act of February 26, 1895, during the month of October, 1899, which classification received departmental approval March 26, 1901.

The Board of Land Commissioners were instructed June 25, 1895 (20 L. D., 571) to "examine for the purpose of classification odd-numbered sections within the grant only." The classification of the even-numbered sections was unauthorized and can not be held as effecting their character.

The act of March 2, 1899, supra, authorized the company to select in lieu of the lands relinquished.

"An equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government

survey, which has been or shall be made of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection," etc.

The subdivisional survey of this township was made in July, 1903, and the deputy surveyor who made the survey reported that the land if cleared would be suitable for grazing, but at present is more valuable for its timber. This was clearly a non-mineral return and the classification of October, 1899, can not be considered a classification of the lands as mineral at the time of actual government survey within the meaning of the act of March 2, 1899, supra. See St. Paul, Minneapolis and Manitoba Ry. Co. (34 L. D., 211) construing the act of August 5, 1892, containing a similar provision.

It appears that the Governor of Idaho applied for the survey of T. 44 N., R. 3 E., with a number of other townships, some of which were included in a previous application, that the application was filed in the United States Surveyor General's office at Boise, Idaho, July 8, 1901, and was forwarded to this office July 10, 1901. This application was duly followed by publication of notice thereof within the time prescribed by the act but no withdrawal appears to have been ordered thereon. The reservation under the act of August 18, 1894, was ineffective as to the lands which had been selected by the company prior to the filing of the Governor's application for survey.

The company had the right to select the lands while unsurveyed and after the filing of the township plat it completed its selection within the time prescribed by the act of March 2, 1899.

The company's claim to these lands under its selection, lists 61, 63 and 65, is clearly superior to that of the State and as to those applicants whose claims were initiated subsequent to the filing of the original lists 61, 63 and 65.

Accordingly your rejection of the State's application to select and of the homestead applications of said Hayes, Johnson, Nystrom, Strobel, West, David, Hanson, Risley, H. R. Estes, Rising, H. E. Estes, Curtis, Logan, Perkins, Edin, Dobbins and Mandell, so far as they cover lands embraced in said State's application is hereby sustained, subject to the right of appeal.

With regard to the claims of said Glover, Root, Thereiault, Cheney, Scheave, Stoddard and Davies, the applicants submitted affidavits duly corroborated, alleging as shown above, settlement prior to the original selection by the company and in view of the prima facie showing made by these applicants, they will in the event this decision rejecting the State's application becomes final be given an opportunity to show their right to the land.

This land is within the limits of the withdrawal ordered by the president's proclamation of November 6, 1906, for the Coeur d'Alene Forest Reserve but as it was included in the prior selection by the company it was not affected by said withdrawal.

The claims of Nystrom, Glover, Cheney, Perkins, Mandell and Theriault to the tracts in Secs. 19, 29, 31 and 35, not covered by the State's application herein considered, will be considered in the cases pending involving such tracts.

Advise the State's authorities and homestead applicants hereof. The resident attorneys for the company will be advised by this office.

Very respectfully,

W. A. RICHARDS,
Commissioner.

FEZ

There was also introduced certified copy of a letter from the Secretary of the Interior to the Commissioner of the General Land Office, dated September 5, 1908, affirming the action of the Commissioner in rejecting the homestead application of West, which letter was marked DEFENDANTS' EXHIBIT NO. 12, which letter is reported in the Decisions of the Secretary of the Interior in Volume 37, Land Decisions, page 135.

There was also introduced as DEFENDANTS' EXHIBIT NO. 10, a certified copy of the patent of the United States to the Northern Pacific Railway Company, which EXHIBIT omitting lands described therein and not involved in this suit, is in words and figures as follows, to-wit:

Instrument Number 23932

THE UNITED STATES OF AMERICA,
To all to whom these presents shall come,
GREETING:

WHEREAS, by the act of Congress approved July 2, 1864, entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route," and the joint resolution of March 31, 1870, there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line and branch, to the Pacific Coast, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States has full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is

definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office;" and

Whereas, official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the first-named act, have reported to him that the said Northern Pacific Railroad and Telegraph line, and branch, excepting that portion between Wallula, Washington, and Portland, Oregon, declared forfeited by the Act of September 29, 1890, have been constructed and fully completed and equipped in the manner prescribed by the act relative thereto, and the same accepted by the President; and

Whereas, by the Act of Congress approved March 2, 1899—30 Stat., 993—authority is given the Northern Pacific Railroad Company, now Northern Pacific Railway Company, to release and convey by proper deed to the United States the lands within Mount Rainier National *Part* and Pacific Forest Reserve theretofore granted to said Company, whether surveyed or unsurveyed, and to select in lieu thereof an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual government survey thereof, lying within any State into or through which the railroad of said company runs; and it is provided that patent shall issue to said company for lands so selected; and

Whereas, the said lands lying within the said Mount Rainier National Park and Pacific Forest Reserve, and the limits of the grant to said railroad company, have been duly released to the United States by the Northern Pacific Railroad Company, the Northern Pacific Railway Company, and the Central Trust Company of New York, and the release has been accepted by the Secretary of the Interior; and

Whereas, there has been filed in the office of the Secretary of the Interior evidence showing that the Northern Pacific Railway Company is the lawful successor in interest of the Northern Pacific Railroad Company as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the act of July 2, 1864, and all subsequent legislation; and

Whereas, the following-described selected land has been duly selected by the authorized agent of the Northern Pacific Railway Company, under the provisions of the act of March 2, 1899, aforesaid, and the lands given as bases therefor are within the primary limits of the Company's grant and lie opposite the constructed line of its road, and are also within the limits of the Reserves to the United States as aforesaid, to-wit:

BOISE MERIDIAN—IDAHO.

* * * * * * *

Township Forty-four North of Range Three East.

The east half of Section Twenty.

* * * * * * *

NOW KNOW YE, that the United States of America, in consideration of the premises, and pursuant to said acts of Congress, has given and granted, and by these presents does give and grant, unto the said Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, its successors and assigns, the tracts of land selected as aforesaid and embraced in the foregoing.

TO HAVE AND TO HOLD the said tracts, with the appurtenances thereof, unto the said Northern Pacific Railway Company, successor as aforesaid, and to its successors and assigns, forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized

and acknowledged by the local customs, laws and decisions of courts, and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirteenth day of October in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States the one hundred and thirty-fifth.

By the President: WM. H. TAFT.

By A. S. STUMP, Assistant Secretary.

(Seal of the General Land Office) H. W. SANFORD, Recorder of the General Land Office.

Recorded: Patent Number 157733.

Recorded at the request of G. H. Plummer, Nov. 15, 1910, at 9 o'clock a. m. Stanley P. Fairweather, County Recorder. By John P. Sheehy, Deputy.

The foregoing is, pursuant to stipulation attached, approved as the abstract of the evidence offered and received at the trial of the case.

Dated March 30, 1914.

FRANK S. DIETRICH,
District Judge.

No. 552.

Filed March 30, 1914.

A. L. RICHARDSON,
Clerk.

DECISION.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Plaintiff,

vs.

EDWARD RUTLEDGE TIMBER COMPANY and NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

Decision.

July 22, 1913.

A. H. Kenyon, and Merritt, Oswald & Merritt, Attorneys for Plaintiff.

James B. Kerr, Stiles W. Burr, E. J. Cannon, and Davis, Kellogg & Severance, Attorneys for Defendants.

DIETRICH, DISTRICT JUDGE:

The plaintiff is seeking to compel the defendants to convey to him the title to the southeast quarter of section 20 in township 44 north of range 3 east of Boise Meridian, timbered land in north Idaho. His theory is that, being a settler upon the tract at the time it was surveyed, qualified to enter the same under the homestead laws of the United States, he was by the Interior Department unlawfully and without fault upon his part denied the right to make entry and procure patent thereto, and that, patent having been issued to the defendant Railway Company through a misapprehension of the law, it took the title in trust for him. The defendant Timber Company is the grantee of the Railway Company. The general rules and conditions under which courts of equity exercise jurisdiction in such cases are well understood, and do not require extended discussion. In the absence of fraud or gross mistake, decisions of the officers of the land department made within the scope of their authority upon questions of fact, or where

questions of law and of fact are inseparably commingled, cannot be reviewed by the courts. But if by manifest mistake of law these officers deprive a man of his right, a court of equity will grant appropriate relief. *Marquez* v. *Frisbie*, 101 U. S. 473; *Moore* v. *Robbins*, 96 U. S. 530; *Johnson* v. *Towsley*, 13 Wall. 72; *Bishop of Nesqually* v. *Gibbons*, 158, U. S. 156; *Johnson* v. *Drew*, 171 U. S. 94. Where, as here, the plaintiff is a private individual, he must establish his personal qualifications and his right to receive the title in controversy, for however erroneous the ruling of the land department a private individual cannot be heard to challenge it unless he has been wronged thereby; the Government alone can appear in behalf of the public interest.

The first inquiry, therefore, is whether at the time he offered his filing the plaintiff was qualified to enter public land as a homestead, and whether in due time he substantially complied or tendered compliance with the requirements of the law. The only suggestion of a personal disqualification on the part of the plaintiff is that, not at the time he offered to file upon the land, but subsequently, after he had resided thereon for a considerable period of time, he acquired and held title to more than 160 acres. But it is thought that if a settler is qualified when he takes up his residence and files upon land which is subject to entry, it is immaterial that he thereafter acquires and holds title to more than 160 acres. *Clark* v. *Mansfield* 24 L. D. 343; *Smith* v. *Longpre*, 32 L. D. 226; *Mathison* v. *Colquhoun*, 36 L. D. 82. See also *Ard* v. *Brandon*, 156 U. S. 537.

As to settlement and improvement, evidence was adduced tending to show that the plaintiff paid a small consideration to a former occupant of the land for his improvements and his prior right of possession, and thereupon took up his residence thereon in May, 1903, and that he has maintained his home there ever since that date; and that he has added to the improvements and cleared and cultivated a small

tract. In due form he applied to make homestead entry on July 17, 1905, shortly after the official survey was approved, but because of the supposed superior rights of the Railway Company his application was rejected. Substantially no evidence was offered by the defendants in rebuttal. While the amount cleared and brought under cultivation from year to year has been pathetically small, I am inclined to the view that, assuming the defendants to be without right, the plaintiff would be entitled to make final proof and receive patent. It has long been the policy of the Government to deal liberally with those who settle in good faith upon the public domain. *Ard* v. *Brandon,* 156 U. S. 537. In view of the controversy over the title, the refusal of the land department to recognize him as having any right, and the prolonged contest proceedings, it was not to be expected that the plaintiff would apply himself to the reclamation of the land with the courage and energy which would be reasonable under other circumstances. Moreover, the land is covered by a heavy growth of timber, which, because of the present want of transportation facilities, is not marketable, and therefore in clearing under the conditions which have prevailed, it has been necessary to destroy by fire timber products the proceeds of which, with a reasonable market, would, in a large part, if not wholly defray the expenses of reclamation. It is a policy of doubtful wisdom, to say the least, which would require the entryman vigorously to pursue a course attended with such great waste. The defendants urge that, in view of the inaccessability of the land, its elevation above the sea level, the climatic conditions, the outlay required to remove the stumps and brush, and the great value of the timber, it is incredible that plaintiff has ever intended in good faith to make it his home, and that, upon the other hand, it must be inferred or presumed that he seeks title only that he may profit from the value of the timber. While I recognize that the possibilities of fraud in entering such lands under

the homestead laws are great, I am unable to see how place can be given to this argument without indulging the conclusive presumption that ordinarily lands covered with a heavy growth of valuable timber are not enterable under the homestead laws—a view which would seem to be contrary to both the letter of the law and the practicable construction placed thereon by the land department. The evidence abundantly shows that, if cleared, the land is tillable and reasonably productive. The winters are rigorous, but not more so than in many places where it is well known agricultural pursuits are carried on with entire success. So far as appears, transportation facilities will be provided here, as they have been elsewhere, in due course of time. Moreover, in adjudging the good faith of the average entryman it would be a mistake to assume that he exercises the same conservative judgment that we look for in the capable and experienced man of business. The financial wisdom of the homeless, land-hungry laboring man may be sheer folly to the successful captain of industry, and in rightly discerning the motives of either we must stand with him and feel the forces by which he, and not another, is moved. While it must be admitted that the argument for the defendants is not without cogency, and is highly persuasive, in the absence of conduct upon the part of the plaintiff inconsistent with the theory of and tending to impeach his good faith, I do not feel justified in holding that, merely because there may be grave doubt whether the land, when divested of the timber, should in the exercise of sound business judgment, be regarded as desirable for agricultural purposes, he has acted in bad faith and has had no purpose to till the soil, but seeks the title only in order that he may thereby secure the valuable growth of timber. While the question is not free from doubt, upon the whole I am inclined to the view that, had the claim of the defendants not intervened, the land department would have accepted plaintiff's proof and issued patent.

Now as to the right and title of the defendants. Briefly stated, the claim of the Railway Company is that, while the lands in question were non-mineral, unreserved public lands of the United States, and prior to the inception of any right on the part of the plaintiff, on June 21, 1901, it, as the successor in interest of the Northern Pacific Railroad Company, made selection thereof under the provisions of an act of Congress entitled, "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," approved March 2, 1899 (30 Stat. L. 993), by filing in the United States Land Office at Coeur d'Alene, Idaho, a proper application and selection list covering this tract, together with others. The description in this list, insofar as it is pertinent here, is as follows: Land which when surveyed will be described as follows: All of Section 20, Township 44, Range 3, in the Coeur d'Alene Land District, in the State of Idaho. Conceding that such a selection list was filed upon the date mentioned, and that at that time the land was unsurveyed, non-mineral public land, the plaintiff contends that such filing was ineffective to withdraw the land from entry, for reasons which we proceed to consider.

The first objection is that, the grant being to the Northern Pacific Railroad Company, and the Railway Company not being named in the granting act, it was not qualified to select the land or to receive a patent therefor. This is one of the questions which it was necessary for the Interior Department to decide and which it did decide. The patent contains an express recital to the effect that upon evidence adduced it was found that the Railway Company was "the lawful successor in interest" of the Railroad Company. In its administration of the public land laws, it is undoubtedly within the jurisdiction of the Interior Department to

pass upon questions of succession, and insofar as such determination involves issues of fact, or issues of mixed law and fact, within the familiar principle, already adverted to it is final and conclusive. But it is said that, contrary to the patent recital, the record shows that there was no evidence upon the point before the Department. Granting that we have before us a transcript of all the proceedings taken in the matter of the plaintiff's application to enter and receive a patent, we cannot assume that we have the entire record in the matter of the Railway Company's application for patent upon its lieu selections, and the presumption must therefore be indulged that the recital is true, in point of fact. It is however, argued that as a matter of law it would be held that the Railway Company could not be an assignee under, or otherwise profit by, the Act, for the grant is to the Railroad Company, and is not assignable. No decision is cited in support of the proposition, nor does plaintiff assign any reason, and apparently none is imaginable, why Congress should have intended to deny the right of assignment, or to confine the operation of the grant to the Railroad Company to the exclusion of its successors in interest. The grant was in no sense a gratuity. The Government contemplated the creation of the Mount Rainier National Park, and to carry out the purpose it was deemed desirable, if not absolutely necessary, to procure title to certain lands embraced in the land grant made to the Railroad Company by the act of July 2, 1864, (13 Stat. 365). For these it was willing to exchange other lands, which it owned, and by the act it proposed to make such exchange. The case is very different from one where the government is promoting a public enterprise by the donation of lands of great value, in which case it may not unreasonably be concerned in the character of the donee, and its qualifications and capacity to carry the enterprise to success. Here, upon the other hand, it was in need of certain privately-owned lands, to carry out its own pur-

poses, and in securing title thereto, surely it was not greatly concerned in the question to whom the consideration should be paid or what was done with it after it was paid. In the light of conditions as they actually existed, and the manifest purpose of Congress to extinguish all private claims to the base lands required for the proposed park, we can do little more than speculate as to the reason why the Railroad Company rather than the Railway Company was named as grantee. It is unreasonable to infer that Congress intended thus to place itself upon record as opposed to the view that the Railway Company had succeeded to the property rights and franchises of the Railroad Company, for but a short time prior thereto, by a proviso in the act of July 1, 1898, (30 Stat. 621; 6 Fed. Stat. Ann. 457), it had expressly disclaimed any purpose to decide or prejudice this question, which was recognized as being of judicial rather than of legislative cognizance. At the present time, the question appears to have been the subject of investigation, and it has been repeatedly held that as a result of foreclosure proceedings consummated prior to the passage of the act of 1899, the Railway Company acquired all the property rights and franchises of the Railroad Company. 21 *Ops. Atty. Gen.* 486; 25 *Ops. Atty. Gen.* 401; *Ferguson* v. *Northern Pacific*, 33 L. D. 634. See also *Northern Pacific Ry. Co.* v. *United States*, 176 U. S. 706; *Northern Pacific Ry. Co.* v. *Boyd*, ... U. S. .....; 35 Sup. Ct. Rep. 554. It therefore appears that the construction contended for by the plaintiff would render the act nugatory. For if this conclusion is correct, and admittedly it is not open to review upon the record here, it turns out that at the time the act of 1899 was passed, the Railroad Company was not possessed of the lands desired by the Government, but that its rights thereto had passed to the Railway Company, and unless we hold either that by inadvertence the Rail*road* Company was named while the Rail*way* Company was intended, or that the privilege con-

ferred upon the Railroad Company is assignable, plainly the act becomes wholly ineffectual for any purpose. It is a cardinal principle that of two possible constructions of a statute that one should be adopted which will give to it effect, in preference to that which would defeat the legislative intent. *M. K. & T. Ry. Co.* v. *Kansas, Pacific Ry. Co.*, 97 U. S. 491, 497. As a general rule of law, restraint upon the right of alienation is not favored, and such grants are assignable. *Webster* v. *Luther*, 163 U. S. 331. *Beley* vs. *Naphtaly*, 169 U. S. 353. Accordingly it is held that the Railway Company could, as a matter of law, by assignment become the successor in interest of the Railroad Company to the rights and privileges conferred by the act of 1899, and it having been found as a fact by the Department that it is such successor, the point must be ruled adversely to the plaintiff's contention.

The next objection to the validity of the Railway Company's "selection" is based upon that provision of the act which limits the right of selection to "*non-mineral* public lands, *so classified as non-mineral at the time of actual Government survey, which has been* or shall be made," etc. Precisely stated, it is that the land was not expressly classified as non-mineral by the surveyors in the field; it is not claimed that it was returned as mineral, nor is there now any question that it was in fact non-mineral. The determination of the relation which it was contemplated by Congress the surveyor's return touching the mineral character of the land should sustain to the right of selection is not free from difficulties, but doubtless the actual character of the land rather than the report thereof was the dominating consideration. *Northern Pacific Ry. Co.* vs. *United States*, 176 Fed. 706. Clearly a selection, valid for certain limited purposes at least, may be made of lands not yet classified as non-mineral, for the right of selection extends to unsurveyed lands, which in the very nature of things,

cannot be so classified. The classification called for, being modal, and therefore incidental rather than substantial, and the land in question being non-mineral in fact, it may be seriously questioned whether the plaintiff should, without showing consequent prejudice or injury to himself, be permitted to take advantage of the neglect of the administrative officers to require, in advance of the issuance of patent, a formal report of a fact about the existence of which there is no doubt. But assuming, without deciding, that under such circumstances relief may properly be granted, it must in the first place be held that the record here is insufficient to warrant a finding that the land was not returned as non-mineral; and in the second place, assuming, as contended by the plaintiff, that the return of survey contains no express classification, I am inclined to the view that under the practice prevailing in the land department, the absence of a classification as "mineral" is equivalent to, and is to be understood as, a classification of non-mineral. Undoubtedly the required report from the surveyors in the field was intended for the information of the officers of the land department, to the end that they might act intelligently and promptly in approving or rejecting applications for patents upon lands selected by the grantee. It is quite unimportant, therefore, in what manner or by what system the facts are reported from the field, provided the communication is understood in the land department. If, when a surveyor is sent out, he is instructed to note in his return all lands found to be of a mineral character as "mineral" and to make no notation at all touching lands found to be non-mineral, it cannot be said that a return made strictly in compliance with such instructions, designating some lands as mineral, and containing no notation at all as to others, fails to classify the latter group as non-mineral. The silence of the return in the one case is quite as significant as the express notation in the other. Now while it is not shown that any special instructions to this

effect were given to the surveyors in this case, it does appear that there is a well recognized custom governing the return of surveys, equivalent to such instructions. "It is the uniform custom in surveying public lands to make in the field notes and surveyor's return notation of mines, outcroppings and evidences of valuable mineral deposits where found. When, therefore, the field notes and surveyor's return make no notation whatever of minerals in the land being surveyed, such lands are considered and treated as given a non-mineral classification by the surveyor." *Davenport* v. *N. P. Ry. Co.*, 32 L. D. 28. See also *Bedal* v. *St. Paul, etc., Ry Co.*, 29 L. D. 254; *State of Idaho* v. *N. P. Ry. Co.*, 37 L. D. 135; *St. Paul, M. & M. Ry. Co.*, 34 L. D. 211; *In re N. P. Ry. Co.*, 40 L. D. 64. Accordingly, assuming the facts to be as stated by plaintiff's counsel, I must hold that the land was classified as non-mineral at the time of the survey.

The remaining contention of the plaintiff is that the selection list filed in the local land office by the Railway Company on June 21, 1901, was ineffectual because of an insufficient description of the land. The pertinent provision of the act is "In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company in the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty." It will be remembered that the description employed by the Railway Company was "land which when surveyed will be described as follows," and there follows a correct numbering of the section, township and range. The real question therefore is, whether under any circumstances a description of unsurveyed land by reference to the technical numbers which it will bear when surveyed designates it with "a reasonable degree of certainty." In general practice such a description is not uncommonly used, and were the plaintiff's position not fortified by the opinion of Acting

Secretary Adams in the Hyde case (40 L. D. 284) I would be inclined to the view that it has little support either in reason or the reported decisions, and, with all due respect, I am unable either to follow the reasoning or to concur in the conclusion of that case. It is true, unsurveyed land may never in fact be surveyed, and it is also true that the Government may in the future adopt a system of surveys radically different from that now in vogue. But these considerations are aside from the point. The description before us is universally understood as being equivalent to a statement that if, under the present system of public surveys, the lines thereof were actually extended, it would appear that this land is the southeast quarter of section 20, in township 44 north, range 3 east of Boise Meridian. So far as concerns the certainty of the description, therefore, it is quite unimportant whether the land is ever surveyed or not, or whether the Government retains or abandons its present system of surveys. Assuming that there are in the immediate vicinity other lands to which the public survey has already been extended, a reasonably intelligent surveyor could, with the data furnished by such a description, go into the field and identify the designated tract, and with precision define its boundaries upon the ground. The description is in effect a description by metes and bounds, with a tie to a fixed monument. To find and identify the land the surveyor selected for such purpose would, in compliance with certain familiar rules governing the making of public surveys, start from an established monument in an adjacent survey already officially approved, and, in accordance with such rules, would run certain courses and distances to reach a certain corner of the designated tract, the boundaries of which could thereupon be run out and defined upon the ground. An amplified description tying the land to such monument and giving in detail the courses and distances and the metes and bounds would have no greater precision than the one we are considering. True,

there may be some slight variation in public surveys, but that is a contingency which cannot be wholly obviated; all paper descriptions are in their application subject to a degree of uncertainty; not infrequently doubt arises in the actual location of the lines called for by an official survey. Moreover, when it comes to patent it is necessary to conform the boundaries of the claim to the boundary lines located upon the ground pursuant to such a description as we have here, less difficulty would be encountered than in adjusting those located without reference to the official survey and where the tie is to some natural object arbitrarily chosen. Indeed it is a matter of common knowledge that settlers upon unsurveyed land as a rule endeavor as best they can to conform their boundaries approximately to the projected lines of an adjacent official survey. There is an apparent assumption upon the part of the plaintiff that it was the duty of the Railway Company in some manner to mark the boundaries of its claim upon the ground, but no such duty if imposed by the act, either expressly or by reasonable implication. The requirement is that the "list" "shall describe" the land with "a reasonable degree of certainty." If to give notice of the claim it were necessary to mark the boundaries an entirely different question would be presented. But evidently it was thought by Congress that when an application was filed in the local land office containing a reasonably definite description it would constitute notice to all the world of the pendency of the claim and the status of the land included therein. I am not to be understood as holding that in all cases the description employed by the Railway Company would be reasonably certain; in any given case the degree of certainty of such description depends largely upon the degree of adjacency of surveyed land. Here the official survey had extended to adjacent townships, and I am wholly unable to understand how a list containing a detailed description by metes and bounds would have any more clearly

advised the plaintiff of the exact location of the land than did the list under consideration. But however that may be in this particular instance, it is apparent that unless the view be adopted that, as a matter of law, under no conditions can a description by reference to the lines of the official survey be held to be in compliance with the act, the question of the sufficiency of the description is in every case one of fact, and hence not subject to review by the courts; and I am wholly unable to assent to the proposition that such a description can under no circumstances be held to be reasonably certain.

By the plaintiff much significance is attached to the clause in the latter part of the act, which provides that, "In case such tract (of unsurveyed land) as originally selected and described in the list filed in the local land office shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity." It is urged that such a method as was followed here admits of no variation or discrepancy requiring adjustment. The argument rests wholly upon the assumption that if the method is authorized at all, it is exclusive; but such an assumption is plainly unwarranted. The Act does not purport to require any given form of description, but upon the other hand gives the widest latitude; its only requirement is that in the selection list the lands shall be designated with a "reasonable degree of certainty"; the method of designation is immaterial provided it identifies the land. It was doubtless anticipated that different methods would be employed, and the provision above quoted was intended to point out the course to be pursued in cases where the original description is not tied to the lines of an official survey, as here. In the Act of 1898 (30 Stat. 620, 621) this method of identification had been expressly sanctioned—indeed it had been prescribed to the exclusion of all others—and it is not reason-

able to believe that if, a few months later, Congress had intended to outlaw it altogether, the communication of such intention would have been left to inference or implication. The better view is thought to be that it was intended not to limit the description to any specific form, but to authorize any method which would identify the land with reasonable certainty, leaving to the Land Department the discretion to adopt such rules and regulations as, in the light of experience, might appear to be desirable. It is not doubted that, under the general language of the act, it is competent for the Department, by standing rules, to prescribe such a description as was used by the Railway Company, or a description by metes and bounds, or both. Whether such authority extends to the requirement that the boundaries be marked upon the ground is another question, which need not be decided. But when the Railway Company filed its list there were no rules or regulations upon the subject, and, as was said by Acting Secretary Pierce, in *Hanson* v. *Northern Pacific Ry. Co.*, (38 L. D. 491), where the sufficiency of this identical list was under consideration, "the practice of allowing selections by the Railway Company as these selections were made had been of such long standing and such uniform practice that it would be unfair, if not illegal, to give retroactive effect to such regulations"; that is, such regulations as were promulgated by circular of November 3, 1909, (38 L. D. 287), requiring a description by metes and bounds, and a posting of notice upon the land, as well as as a reference to the projected lines of the official survey. In adopting such rules and at the same time sustaining prior selection lists not in compliance therewith, the department was not necessarily acting inconsistently. The act does not require a perfect or the best possible description, but only one having a reasonable degree of certainty. It does not follow that one form of designation is wanting in a reasonable degree of certainty because, in the light of experience,

another is adopted which for the time being is thought to be a better. Otherwise the future promulgation of still more stringent regulations would operate to invalidate selections made in strict compliance with the rules now in force. The true view is thought to be that, within the range of sound discretion, the land department is clothed with the authority to determine as a question of fact whether, under the circumstances of the case, any given designation is reasonably certain, and when fairly made within such limits such determination should not be disturbed, even though the courts may be of the opinion that greater precision is both desirable and practicable. My conclusion is that it cannot be held that, as a matter of law, such form of description as was here employed is, under any and all conditions, insufficient to designate the land with a reasonable degree of certainty, and as a question of fact there is no showing warranting a finding that, under the circumstances of this case, the Department either acted fraudulently or abused its discretion in holding the designation to be sufficient.

Much stress is laid upon the familiar rule that public grants are construed strictly against the grantee. In applying this rule, however, some consideration should be given to the fact that the grant here was not a mere gratuity, but that the act is in the nature of an offer upon the part of the Government of an exchange of lands presumably beneficial to it. Besides, the question in controversy relates not to the extent of the grant but only to procedure in the administration of the act, a subject which is left largely to regulation by the land department. As was said by Assistant Secretary Pierce in *State of Idaho* v. *Northern Pacific Ry. Co.*, (37 L. D. 135, 138): "It was deemed necessary to the accomplishment of its purpose that the United States should own the land placed in reservation by the act (original land grant act). A voluntary conveyance

by the Railway Company was the most feasible method of re-acquiring title to the granted land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The act is contractual in character, and terms and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer." But laying aside these considerations, and applying the rule with all possible rigor, how can we construe the act so as to exclude, as a matter of law, descriptions by reference to the official survey? Clearly no such inhibition is expressed, and if implied at all it must be found in the requirement that the land be designated "with a reasonable degree of certainty." But, as we have already seen, within certain limits what is a reasonable degree of certainty in any given case is a question not of law but of fact.

In conclusion it is to be noted that the Railway Company pursued a course which, if not at the time expressly prescribed by, received the latter approval of, and all the time had the apparent sanction of usage in, the land department. The plaintiff was neither misled nor prejudiced thereby, for seemingly he had no knowledge of the existence of the list, and therefore whatever may have been the form of the description, it could not have influenced his action. The claims of a pioneer settler always appeal strongly for sympathy, but upon the most earnest consideration I am unable to grant the relief prayed for and at the same time preserve the integrity of what I understand to be the law.

From what has been said, it necessarily follows that the bill must be dismissed, and such will be the decree; each party to pay his own costs. The attorneys for the defendants may prepare form of decree.

Endorsed: Filed July 22, 1913. A. L. Richardson, Clerk.

DECREE.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

v.

EDWARD RUTLEDGE TIMBER COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

Decree.

The above entitled cause having come on to be heard, the complainant appearing by his solicitors, A. H. Kenyon and Seabury Merritt, and the defendants appearing by their solicitors Edward J. Cannon, Stiles W. Burr, and James B. Kerr, and having been submitted to the court upon the pleadings therein, and upon proof taken in open court, and said cause having been argued by counsel, and the court being advised, it is, on motion of counsel for the defendants,

ORDERED, ADJUDGED AND DECREED that the bill of complaint of the complainant herein be and it is hereby dismissed for want of equity.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither party shall recover costs or disbursements from the other.

By the Court:

Nov. 17, 1913. FRANK S. DIETRICH,

Judge.

Endorsed: Filed Nov. 17, 1913. A. L. Richardson, Clerk.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation; and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Assignments of Error.

Comes now the above named complainant, Andrew West, and in connection with his appeal makes the following assignments of error which he avers were committed by the court in the trial of this cause, and upon which he will rely in the prosecution of his appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Ninth Circuit:

I.

The court erred in holding and deciding that the description contained in the original Selection List No. 61, made and filed by the defendant Northern Pacific Railroad Company, which described the real estate in controversy as follows:

"Land which when surveyed will be described as follows: ALL OF SECTION TWENTY (20), TOWNSHIP FORTY-FOUR (44), RANGE THREE (3), IN THE COEUR D'ALENE LAND DISTRICT IN THE STATE OF IDAHO,"

was sufficient to designate the land intended to be claimed with a reasonable degree of certainty.

II.

The court erred in holding and deciding that the real estate in controversy had been classified as land non-min-

eral in character, as provided in the Act of March 2, 1889, under which the defendant claimed.

III.

The court erred in holding and deciding that the Northern Pacific Railway Company was the successor to or had the right to exercise the rights of the Northern Pacific Railroad Company, which was expressly named in the grant.

IV.

The court erred in holding and deciding that the recital in the patent that the Railway Company was "the lawful successor in interest" of the Railroad Company was binding and conclusive upon the parties.

V.

The court erred in rendering judgment against the complainant.

WHEREFORE, complainant prays that the aforesaid errors be corrected and the judgment of the District Court reversed, and that said court be directed to set aside the judgment heretofore rendered in favor of the defendants and enter judgment in complainant's favor; that the defendants hold the title to said real estate in trust for the complainant, and that his title thereto be quieted, or, if it be deemed that such relief is not grantable, that the cause be remanded for new trial.

A. H. KENYON,
MERRITT, OSWALD & MERRITT,
Attorneys for Complainant, Andrew West.

Endorsed: Filed March 30, 1914. A. L. Richardson, Clerk.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation; and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Appeal and Allowance.

The above named complainant, Andrew West, conceiving himself aggrieved by the judgment entered on the 17th day of November, 1913, in the above entitled cause, doth hereby appeal from said judgment to the United States Circuit Court of Appeals, for the Ninth Circuit, and he prays that this, his appeal, may be allowed; that a transcript of the record, proceedings and papers upon which said judgment was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

A. H. KENYON,
SEABURY MERRITT,
Attorneys for Complainant and Appellant, Andrew West.
Old National Bank Building,
Spokane, Washington.

And now, to-wit: on the 30th day of March, 1914, IT IS ORDERED, that the appeal be allowed as prayed for and that the amount of bond on said appeal be, and it hereby is, fixed at $200.00.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed March 30, 1914. A. L. Richardson, Clerk.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation; and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Bond.

KNOW ALL MEN BY THESE PRESENTS, That Andrew West, as principal, and *THE AETNA ACCIDENT AND LIABILITY COMPANY, of Hartford, Conn., a corporation of the State of Connecticut and* licenser to become sole surety on bonds in the State of Idaho, as surety, are held and firmly bound unto the above named defendants in the sum of TWO HUNDRED (200) DOLLARS, to be paid to the above named defendants, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators and assigns, jointly and severally by these presents.

SEALED WITH OUR SEALS and dated this 9th day of February, 1914.

WHEREAS, the above named Andrew West has prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the decree rendered by the Judge of the District Court of the United States for the District of Idaho, Northern Division, in the above entitled action.

NOW, THEREFORE, the condition of this obligation is such, that if the above named Andrew West shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then this obligation shall

be void, otherwise the same shall be and remain in full force and virtue.

ANDREW WEST, (Seal)
By A. H. Kenyon, his attorney,
Principal.

(Corporate Seal)

THE AETNA ACCIDENT AND LIABILITY COMPANY,
By Abe Wyman, Its Resident Vice President,
Therett Towles, Its Resident Assistant Secretary,
Surety.

State of Idaho,
County of Shoshone,—ss.

On this 2nd day of April, in the year Nineteen Hundred Fourteen, before me, a Notary Public, personally appeared Abe Wyman and Therett Towles, known to me to be the Resident Vice President and Resident Assistant Secretary, respectively, of THE AETNA ACCIDENT AND LIABILITY COMPANY, the corporation that executed the foregoing instrument and acknowledged to me that such corporation executed the same; that they know the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company; that they signed their names thereto by like order; that the said company has been duly licensed by the Insurance Commissioner of the State of Idaho, to transact a surety business in the State of Idaho and is authorized by the laws of the State of Idaho to become sole surety upon bonds.

(N. P. Seal) ADOLPH ROSSI,
Notary Public.

My commission expires Jan. 4, 1915.

Approved April 9, 1914:

DIETRICH, Judge.

Endorsed: Filed April 9, 1914. A. L. Richardson, Clerk.

PRAECIPE.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Complainant,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and EDWARD RUTLEDGE TIMBER COMPANY, a Corporation,

Defendants.

Praecipe.

An appeal having been prosecuted by the complainant above named from the final decree entered herein, dismissing the bill of complaint of the complainant.

IT IS NOW STIPULATED by and between the parties hereto, by their respective solicitors, that the following papers shall, together with the petition for appeal, order allowing appeal, bond on appeal, citation on appeal, be incorporated into and constitute the record on such appeal:

1. Copy of Bill of Complaint.

2. Copy of Answer of defendant, Northern Pacific Ry. Co.

3. Copy of Answer of defendant, Edward Rutledge Timber company.

4. Copies of the replications of the complainant to the answers of the defendants.

5. The abstract of the evidence approved by the trial court.

6. A copy of the original plat, marked Defendants' Exhibit 3, introduced in evidence in connection with the testimony of the witness, Lloyd Gilham.

7. A copy of the final decree.

8. A copy of the opinion of the trial court.

It is further stipulated that such transcript, including the foregoing papers, may be approved by the Judge of said court for the purposes of the appeal herein.

A. H. KENYON,
SEABURY MERRITT,
Solicitors for Complainant.
E. J. CANNON,
C. W. BUNN,
JAMES B. KERR,
Solicitors for Defendant Northern Pacific Railway Co.
STILES W. BURR,
JAMES B. KERR,
Solicitors for Defendant Edward Rutledge Timber Company.

Endorsed: Filed March 30, 1914. A. L. Richardson, Clerk.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Plaintiff,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation; and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Citation.

United States of America,—ss.

The President of the United States to Edward Rutledge Timber Company, a corporation and the Northern Pacific Railway Company, a corporation, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the Clerk's office of the United

States District Court for the District of Idaho, at Boise, Idaho, wherein Andrew West is appellant and you are respondent, to show cause, if any there be, why the decree rendered against said Andrew West, appellant as in the said order allowing the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Frank S. Dietrich, United States District Judge for the District of Idaho, this 9th day of April, 1914.

FRANK S. DIETRICH,
United States District Judge for the District of Idaho.

Attest:

A. L. RICHARDSON,
Clerk of the District Court of the United States for the District of Idaho.

Service of the foregoing citation admitted and receipt of copy acknowledged this 16th day of April, 1914.

STILES W. BURR and
JAMES B. KERR,
Solicitors for Respondent
Edward Rutledge Timber Company.

C. W. BUNN,
E. J. CANNON and
JAMES B. KERR,
Solicitors for Respondent
Northern Pacific Railway Company.

Endorsed: Filed on return April 22d, 1914. A. L. Richardson, Clerk.

Return to Record.

And thereupon it is ordered by the court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to

the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

(Seal) A. L. RICHARDSON,
Clerk.

Clerk's Certificate.

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Appellant,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Respondents.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 96, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in accordance with Praecipe for Transcript, on file in said cause.

Witness my hand and the seal of said court affixed at Boise, Idaho, this 30th day of April, 1914.

(Seal)

A. L. RICHARDSON,
Clerk.

No. 2416

United States

Circuit Court of Appeals

For the Ninth Circuit.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

[Certificate of Clerk U. S. District Court Re Cost of Record on Appeal.]

In the District Court of the United States for the District of Idaho, Northern Division.

ANDREW WEST,

Plaintiff and Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, and NORTHERN PACIFIC RAILWAY CO.,

Defendants and Respondents.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the cost of the record on appeal, in the above-entitled cause, amounting to the sum of $151.20 has been paid by the appellant.

Witness my hand and the seal of said Court this 7th day of May, 1914.

[Seal] A. L. RICHARDSON,

Clerk U. S. District Court, District of Idaho.

[Endorsed]: No. 2416. United States Circuit Court of Appeals for the Ninth Circuit. Certificate of Clerk U. S. District Court Re Cost of Record on Appeal, etc. Filed May 12, 1914. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twenty-seventh day of October, in the year of our Lord one thousand, nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding, Honorable ERSKINE M. ROSS, Circuit Judge, Honorable CHARLES E. WOLVERTON, District Judge.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, et al.,

Appellees.

Order of Submission.

ORDERED, appeal in the above-entitled cause argued by Mr. A. H. Kenyon and Mr. Seabury Merritt, counsel for the appellant, and by Mr. James B. Kerr, and Mr. Stiles W. Burr, counsel for the appellees, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifteenth day of February, in the year of our Lord one thousand, nine hundred and fifteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

[Order Directing Filing of Opinion etc.]

ORDERED that the typewritten opinion this day rendered by this Court in each of the following-entitled causes be forthwith filed by the clerk, and that a Judgment or Decree be filed, and recorded in the Minutes of this Court, in each of the causes in accordance with the opinion filed therein: * * * Andrew West, Appellant, vs. Edward Ruttledge Timber Company, a Corporation, et al., Appellees. No. 2416. * * *

[Opinion U. S. Circuit Court of Appeals.]

No. 2416.

In the United States Circuit Court of Appeals for the Ninth Circuit.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Respondents.

A. H. KENYON and SEABURY MERRITT, for Appellant.

JAMES B. KERR, STILES W. BURR, HORACE H. GLENN, CHARLES W. BUNN and CHARLES DONNELLY, for Respondents.

Before GILBERT and ROSS, Circuit Judges and WOLVERTON, District Judge.

This is a suit by Andrew West to have the defendant Edward Rutledge Timber Company declared a trustee of the title to the Southeast quarter of Section 20, Township 44 North, Range 3 East, Boise Meridian, situate in the State of Idaho, for his use. The Northern Pacific Railway Company, the successor to the Northern Pacific Railroad Company, with a view to making lieu selections in pursuance of the Act of March 2, 1899, filed in the United States Land Office at Coeur d'Alene, Idaho, on June 21, 1901, its selection list No. 61, designating for selection tracts

of land "when surveyed" to be described, among others, all of Section 20, Township 44 North, Range 3 East, Boise Meridian. Later, to wit, on July 31, 1905, the company filed its new selection list, describing the land definitely by its legal subdivisions. The plat of the Government survey of Township 44 was filed in the local land office July 17, 1905. Patent was issued by the Government October 13, 1910. The Timber Company is the successor to the Northern Pacific Railway Company. When the first selection list was filed Township 45 North, Range 3 East, the one next on the North of 44, had been surveyed and the plat filed in the local land office.

West settled upon the quarter section above described May 15, 1903, having bought out John Hanson, who had previously settled on the tract and made some improvements thereon. West continued his residence, making further improvements, and on July 17, 1905, filed in the local land office an application to make Homestead Entry of the land, which was rejected by the Register and Receiver on the ground that the Northern Pacific Railway Company had previously made selection of the same by their list No. 61, in pursuance of the Act of March 2, 1899, which rejection was subsequently approved by the Commissioner of the General Land Office, and later by the Secretary of the Interior.

The Act of March 2, 1899 (30 Stat. 993), is an act to set aside certain public lands to be known as the Mt. Rainier National Park. By Section 3 the Northern Pacific Railroad Company, upon relinquishing to

the Government lands comprised by the Park which had been theretofore granted to the Railroad Company, was authorized "to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual Government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States."

Section 4 provides: "That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the

local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

To prevail, the plaintiff must sustain the position that the description contained in the Railway Company's selection list first filed was, as matter of law, insufficient to support the selection, for if it depended on a matter of fact the controversy would be settled by the judgment of the Land Department in rejecting the application of West for homestead entry and approving the selection of the Railway Company. "It has undoubtedly been affirmed over and over again," says the Supreme Court, "that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final." Burfenning v. Chicago, St. Paul &c. R'y., 163 U. S. 321, 323.

It would seem that the Land Department had not, prior to the time that the Railroad Company filed its first selection list, No. 61, adopted or promulgated any rules or regulations, prescribing the manner of describing lands sought to be selected by the Railway Company under the specific Act of March 2, 1899. Rules were prescribed by the Land Department relative to the selection of lieu lands by the Northern Pacific Railroad Company or its grantee, under the Act of July 1, 1898, by which it was required that "the selection must be of the whole or some legal subdivision of a designated odd-numbered section, so that the public survey when made will

give identity to the land selected"; and, further, that "Selections of unsurveyed lands by an individual claimant must be designated according to the description by which they will be known when surveyed, if that be practicable, or, if not practicable, by giving with as much precision as possible the locality of the tract with reference to known land marks, so as to admit of its being readily identified when the lines of survey come to be extended." These rules were promulgated February 14, 1899 (28 L. D 103, 108).

The statute itself provides that "All selections of unsurveyed lands shall be of odd-numbered sections to be identified by the survey when made."

At a later date, namely, May 9, 1899, the Department promulgated another rule relating specifically to lieu selections connected with forest reserves (the act allowing such selections having been adopted June 4, 1897, 30 Stat. 36), which provides: "Every selection of unsurveyed land must designate the same according to the description by which it will be known when surveyed, if that be practicable, or, if not practicable, must give, with as much precision as possible, the locality of the tract with reference to known landmarks, so as to admit of its being readily identified when the lines of public survey come to be extended." (28 L. D. 521, 523).

The adoption of the latter rule seems to have been made necessary by a previous decision of the Land Department holding that unsurveyed as well as surveyed lands were subject to lieu selection under the Act of June 4, 1897. F. A. Hyde et al., 28 L. D. 284.

These rules were in effect, therefore, when the Railway Company made its selection No. 61, but were framed, as we have seen, with specific reference to the acts of June 4, 1897, and July 1, 1898. But by virtue of their general terms, the rules may readily have been made applicable to the selection of all unsurveyed lands.

On February 21, 1908, the Interior Department issued a circular in terms applicable to all forms of scrip, warrants, certificates, soldiers' additional homestead rights, and lieu selections, of whatever kind, which provided for the posting on the land of notice of the selection, application or entry, the same to govern on and after April 1, 1908. 36 L. D. 278.

On November 3, 1909, the Commissioner of the General Land Office, in order to remedy the confusion and uncertainty arising from applications and selections for filings and locations upon unsurveyed public lands, promulgated another rule prescribing that such selection, filing or location must contain a description of the land by meets and bounds, with courses, distances, monuments, and "the approximate description of the land, by section, township, and range, as it will appear when surveyed must be furnished; or if this cannot be done, an affidavit must be filed setting forth a valid reason therefor." 38 L. D. 287.

This in the way of tracing the history of the promulgation of rules by the Land Department as it relates to describing lands in filings by entrymen and in lieu selections.

It stands to reason that none of these rules can have a retroactive effect, and persons making filings

and selections prior to their promulgation cannot be charged with their observance. Such has been the practice and ruling of the Land Department. Hanson et al., v. Northern Pacific Ry. Co., 38 L. D. 491; F. A. Hyde et al., 40 L. D. 284.

The question as to the sufficiency of a selection descriptive in terms of future survey came up in the Land Department in the Hanson case, and was determined in the affirmative. There was involved in the case the West half of the Southwest quarter, the Northeast quarter of the Southwest quarter, and the Northwest quarter of the Southeast quarter of Section 21, Township 44, a section lying alongside of the section comprising the lands in dispute here.

In a recent case, Daniels v. Northern Pacific Ry. Co., decided August 3, 1914, the Department has affirmed its holding in the Hanson case, and by express terms overrules the case of F. A. Hyde et al., *supra*, so much relied upon by counsel for plaintiff in support of the opposite view. In the Hanson case it does not appear that any proximate township or other Government line had been run at the time of making the selection, and still it was held that a selection by description in terms of future survey was sufficient. The learned Assistant Secretary who rendered the decision had cause to remark that "The practice of describing unsurveyed land in terms of a future survey thereof has been in existence for many years, and was never challenged prior to the decision of F. A. Hyde et al., sup."

From the foregoing it not only appears that the practice of describing lands for entry or selection in

terms of future survey has been sanctioned by the rules and regulations of the Land Department and its decisions, but by statute, though it has latterly been considered the better practice to require a more particular description. Thus we are thrown back to the primary inquiry, whether the description contained in the Railway Company's selection designates the tract with a reasonable degree of certainty, notwithstanding the practice and decisions of the Land Department. The decisions of the Land Department as to its own authority are entitled to respect and are persuasive; but if the Department has exceeded its power its acts are *coram non judice* and void. Of course, when the law has declared what is a sufficient description it must be held to be controlling.

That Congress, as it did by the Act of July 1, 1898, and that the Land Department, as it did by its earlier rules and regulations, and its rulings and decisions, should have regarded a description in terms of future survey as sufficient is strongly persuasive of its legal sufficiency.

It may be conceded, in so far as it respects this case, that a description of a section or a quarter section by legal subdivisions in the fastnesses of the Cascades or Rocky Mountain ranges, far distant from any Government survey, or even generally that a description in terms of future survey, is not such a description as is contemplated by the statute. What may be a sufficient description for designating the tract under one set of circumstances might be wholly insufficient under another. Every one is

presumed to know the method by which the Government surveys are made, and what is meant by township and range, and what by section and quarter section, or other legal subdivisions, and the relation of one township to another and of one section with its subdivisions to another. So that, for instance, if Township 2 North is surveyed, and a tract is described as Section 1 in Township 1 North, there could be no question that the tract was designated with a reasonable degree of certainty. It would be the section immediately south of surveyed Section 36 in Township 2 North. It is a maxim that that is certain which can be made certain, and its application would make the result perfectly manifest. Section 1 in that case would be tied directly to fixed monuments, to wit, the Southeast corner of Township 2, and the Southeast and Southwest corners of Section 36 in that Township. To designate signifies "To mark out or indicate by visible lines, marks, description, name, or something known and determinate." Century Dictionary. A description by legal subdivision is a perfectly intelligible designation of a tract of land, so it must follow that a description which will be a legal subdivision when surveyed, if lying adjoining a subdivision already surveyed, is also a perfectly intelligible description; and any one at all familiar with the Government surveys could not be mistaken as to what was meant by the designation, and would be ready to locate the premises. Such a description would be absolutely good in a contract or deed, and would convey title.

Now, if we move away a step farther from the

established survey, and describe the tract to be selected as Section 12, Township 1 North, it would not be a difficult task to set foot on the land and determine accurately its limitations. There would still be a reference back or a tying back to Section 36, Township 1 North. But the farther the remove from an established survey, it stands to reason, the greater will be the difficulty of setting foot on the identical tract, until evenutally no reasonable being could expect another to tie back to a known survey for the purpose of identification.

Section 20, the tract designed to be selected by the Railway Company, is situate 3 miles south of Section 32 in Township 45, a surveyed township, and could be readily located from such survey, although in a rough country. So that one could not widely mistake the premises on the ground. In fact, Olaf Edin, who helped run the exterior lines of the West claim in 1901, says: "We undertook to tie them up to the Government lines which had already been run as near as we could." The selection list was filed in the local land office, and this was notice to all parties that the Railway Company claimed the land, if its designation of the tract was legally sufficient.

The purpose of the statute was not that the selector should so describe the land as that the Government could make its patent by such description, for it contemplates that the land shall be described anew when surveyed by legal subdivisions, and that the patent shall carry that description. An exact description is therefore unimportant, but the applicant must designate the tract designed to be selected with a

reasonable degree of certainty. The filing of the first list is in a sense preliminary to obtaining the patent. It initiates the right, and not as much particularity and exactness is ordinarily required as to where final stages are to be observed in clearing up and completing the transaction. In fact, by contemplation of the statute, the new selection is required to conform with the established survey and thus to correct the description in the primary selection. By reasonable intendment, therefore, we are impressed that the description contained in the Railway Company's list No. 61, under the conditions prevailing of the survey of Township 45 to the north and the proximity of the land in question thereto, designated the land with a reasonable degree of certainty, and must be held sufficient as a matter of law.

It is urged that Congress must have intended a more particular description than one in terms of future survey by reason of the use of different language in denoting the manner of description in the act of March 2, 1899, from that employed in the act of July 1, 1898. But if this be true as a general rule, nevertheless, for the reasons above stated, the description in the present case in terms of future survey, under the conditions existing, designates the land sought to be selected with a reasonable degree of certainty.

That being the single question urged here for our decision, the decree of the District Court is affirmed with costs to the respondents.

[Endorsed]: No. 2416. United States Circuit Court of Appeals for the Ninth Circuit. Opinion.

Filed Feb. 15, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees.

Decree U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the District of Idaho, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Northern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellees and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[Endorsed]: No. 2416. United States Circuit Court of Appeals for the Ninth Circuit. Andrew

West, vs. Edward Rutledge Timber Company, a Corporation et al., Decree. Filed and Entered Feb. 15, 1915. F. D. Monckton, Clerk.

[Petition for Appeal to the Supreme Court from the Circuit Court of Appeals, Ninth Circuit.]

Number 2416.

ANDREW WEST,

Plaintiff,

vs.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY.

The above-named appellant, Andrew West, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment has therein been rendered on the 15th day of February, A. D. 1915, affirming the decree of the District Court of the United States for the Northern Division of the District of Idaho, and that the matter in controversy in said suit exceeds $1,000, besides costs; that this cause is not one in which the United States Circuit Court of Appeals for the Ninth Circuit has final jurisdiction, and that it is proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said Appellant prays that an appeal be allowed him in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals from the Ninth Circuit to send the record and

proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the Assignment of Errors herewith filed by the said applicant may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

A. H. KENYON,
SEABURY MERRITT, and
S. M. STOCKSLAGER,
Attorneys for West, Appellant.

[Endorsed]: Petition for Appeal to Supreme Court U. S. Filed September 14, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

No. 2416. Petition for Appeal to the Supreme Court from the Circuit Court of Appeals, Ninth Circuit. Andrew West, Plaintiff, vs. Edward Rutledge Timber Co., and Northern Pacific Railway Co. Filed Sep. 14, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

[Assignment of Errors.]

United States Circuit Court of Appeals, Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY et al.,

Appellee.

The appellant in the above-entitled cause, in connection with his petition for appeal herein, presents and files herewith his Assignment of Errors, as to which matters and things he says the decree entered herein on the 15th day of February, 1915, is erroneous, to wit:

1.

The tract of land involved having been unsurveyed at the date of the claimed selection by the Northern Pacific Railroad Company, the grantor of the appellee company, under the act of March 2, 1899, the description of the tract in the selection in the terms of a future survey, when made, the Court erred in adjudging and decreeing that the description contained in the original selection list No. 61 was sufficient to designate the land intended to be claimed with a reasonable degree of certainty.

1½

That the Court erred in holding and deciding that the Northern Pacific Railway Company was the suc-

cessor to or had the right to exercise the rights of the Northern Pacific Railroad Company, which last-named company was expressly named in the grant, there being no evidence upon that fact in the case.

II.

The Court erred in holding and decreeing that such a description was notice and was sufficient to protect the selector against the rights of the appellant acquired by his settlement, residence, cultivation and improvement of the tract under the provisions of the homestead law made prior to the survey and continued thereafter, without any notice whatever of the selection.

III.

The Court erred in adjudging that the survey of Twp. 45 N. R. 3 East, the one next on the north of 44, prior to the filing of the selection list, added anything to the certainty of this void description or aided in any way in making it certain, for the reason, among others, that by statute, all surveys are made from the South and East as was that of the Twp. in which the lands involved are situated, throwing the lots on the north and west of the Twp.

IV.

The Court erred in holding that notwithstanding the entire failure of the surveyor to classify the lands involved as nonmineral at the time of the actual Government survey, as required by the Act of March 3, 1899, they were subject to selection thereunder.

V.

The Court erred in holding that as the land involved was classified as mineral by the Commis-

sioners appointed under the Act of Feby. 26, 1895, entitled "An Act to Provide for the Examination and Classification of Certain Mineral Lands in the State of Montana and Idaho" and this classification approved by the Secretary of the Interior and the records made to conform to such classification prior to the date of the selection, it was subject to selection under the Act of March 2, 1899, which specifically required that the land to be selected should be nonmineral, and so classified.

VI.

The Court erred in not holding that as the land selected in this case had been classified as mineral under said Act, and as the selection was made by the Northern Pacific Ry. Co., it was made the duty of the Secretary of the Interior by the terms and provisions of the law to "reject, cancel and disallow" it.

VII.

The Act of March 2, 1899, being a private grant or exchange, contractual and complete in itself, constitutes a private option and a selection thereunder a private contract requiring strict construction; for this reason alone, none of the circulars quoted by the Court, based upon public acts, or acts in behalf of settlers, which are entitled to a liberal construction, are applicable, and the Court erred in applying them in this case.

VIII.

The Circuit Court of Appeals after holding that prior to the selection the Department had not adopted or promulgated any rules or regulations prescribing the manner of describing lands sought to

be selected by the railway company under the specific Act of March 2, 1899, erred in adjudging that the Circular of Feby. 14, 1899, under the Act of July 1, 1898, was applicable in the construction of the Act at bar, for the reason, among others, as held and decided by the Interior Department, September 5, 1908 (37 L. D. 135), that the two statutes had no common purpose, and further holding, that this Circular was issued prior to the passage of the Act of March 2, 1899.

IX.

The Court also erred in adjudging that the Circular of May 8, 1899, under the Act of June 4, 1897 (28 L. D. 521), was applicable to the Act of March 2, 1899, for the reason, as held by the Department Sept, 5, 1908, *supra,* the Act of March 2, 1899, being contractual in character and complete in itself, it should be construed independently of other statutes having a different purpose. Moreover, this Circular was revoked by the Department December 18, 1899, (29 L. D. 394), a date prior to the date of the selection, and another Circular substituted which required publication and posting on the land when unsurveyed, neither of which was done by the company in this case.

X.

The Court erred in not adjudging and deciding that appellee had no right to the land and that it should be decreed to hold as trustee of appellant and be required to convey the legal title to him.

Wherefore the appellant prays that said decrees may be reversed and the appellant may have an ad-

judication and decree in his favor as herein specified.

A. H. KENYON,
SEABURY MERRITT, and
S. M. STOCKSLAGER,
Attys. for Appellant.

[Endorsed]: Assignment of Errors on Appeal to Supreme Court U. S. Filed September 14, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

No. 2416. United States Court of Appeals, Ninth Circuit. Andrew West,, Appellant, vs. Edward Rutledge Timber Company et al., Appellee. Assignment of Errors. Filed Sep. 14, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

Appeal and Allowance to the Supreme Court of the United States from the Circuit Court of Appeals, Ninth Circuit.

No. 2416.

ANDREW WEST,
Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellee.

APPEAL AND ALLOWANCE.

The above-named appellant, conceiving himself

aggrieved by the decree entered on the 15th day of February, 1915, in the above-entitled cause, doth hereby appeal from said decree to the Supreme Court of the United States, and he prays that this, his appeal, may be allowed; that a transcript of the record, proceedings and papers upon which said decree was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

A. H. KENYON,
SEABURY MERRITT,
Old National Bank Building, Spokane, Washington.

and

S. M. STOCKSLAGER,
McGill Building, Washington, D. C.,
Attorneys for Appellant Andrew West.

Now, on this 14th day of September, 1915, IT IS ORDERED, that the appeal in the foregoing cause be allowed as prayed for, and that the amount of the bond on said appeal be, and it hereby is, fixed at $500.00.

WM. W. MORROW,
U. S. Circuit Judge, and Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Bond on Appeal. Filed Sept. 14, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

No. 2416. Appeal and Allowance to the Supreme Court of the United States from the Circuit Court of Appeals, Ninth Circuit. Andrew

West, Appellant, vs. Edward Rutledge Timber Co., a Corporation, and Northern Pacific Railway Co., a Corporation, Appellee. Filed Sep. 14, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Paul P. O'Brien, Deputy. Clerk.

THE AETNA
ACCIDENT AND LIABILITY
COMPANY.
HARTFORD, CONNECTICUT.
MORGAN G. BULKELEY
PRESIDENT.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, Andrew West, Appellant above named, as principal, and THE AETNA ACCIDENT AND LIABILITY COMPANY, of Hartford, Connecticut, a corporation of the State of Connecticut, and licensed to become sole surety on bonds in the

States of Washington and California, as surety, are held and firmly bound unto the above-named Edward Rutledge Timber Company, a corporation, and Northern Pacific Railway Company, a Corporation, in the penal sum of FIVE HUNDRED DOLLRS ($500.00), to be paid to the said parties, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated this 10th day of September, 1915.

WHEREAS, the above-named Andrew West has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit, by the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, THEREFORE, the condition of this obligation is such, that if the above-named Andrew West shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then this obligation shall be void, otherwise the

same shall be and remain in full force and virtue.

ANDREW WEST. [Seal]
By A. H. KENYON,
His Attorney,
Principal.

THE AETNA ACCIDENT AND LIABILITY COMPANY,
By C. T. HANSEN,
Its Resident Vice-President.

[Seal] By F. W. MADDUX,
Its Resident Assistant Secretary,
Surety.

State of Washington,
County of Spokane,—ss.

On this 10th day of September, in the year Nineteen Hundred and Fifteen, before me, a Notary Public, personally appeared C. T. Hansen and F. W. Maddux, known to me to be the Resident Vice-president and Resident Assistant Secretary, respectively, of THE AETNA ACCIDENT AND LIABILITY COMPANY, the corporation that executed the foregoing instrument and acknowledged to me that such corporation executed the same; that they knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said company; that they signed their names thereto by like order; that the said company has been duly licensed by the Insurance Commissioners of the States of Washington and California, to transact a surety business in said States, and is authorized by the laws of said

States to become sole surety upon bonds.

[Seal] A. J. ROE,
Notary Public.

The foregoing bond is approved this 14th day of September, 1915.

WM. W. MORROW,
U. S. Circuit Judge, and Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Bond on Appeal to Supreme Court U. S. Filed Sept. 14, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

[Endorsed]: Aetna Life Insurance Company. Casualty Insurance. Surety Bonds. The Aetna Accident & Liability Co. Hartford, Conn. $500.00. On Behalf of Andrew West, in Favor of Edward Rutledge Timber Company, a Corporation, and Northern Pacific Railway Company, a Corporation. Bond on Appeal.

No. 2416. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 14, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

[Praecipe for Certified Transcript of Record on Appeal to Supreme Court U. S.]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees

To the Clerk of said Court:

Sir: Please make and issue a certified Printed Transcript of the Record on appeal to the Supreme Court of the United States in the above-entitled cause, the record to consist of a copy of the following:

1. Printed Transcript of Record on which the above-entitled cause was heard in said Circuit Court of Appeals;

2. Certificate of Clerk U. S. District Court Re Cost of Record on Appeal, etc., filed May 12, 1914;

3. Order, entered October 27, 1914, of submission;

4. Order, entered February 15, 1915, directing filing of opinion, etc.;

5. Opinion, filed February 15, 1915;

6. Decree, filed and entered February 15, 1915;

7. Petition for, and Order Allowing Appeal to Supreme Court U. S.;

8. Assignment of Errors on said appeal;
9. Bond on said appeal;
10. This Praecipe, and
11. Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record on said Appeal;
12. Original Citation on said appeal.

Please prepare 25 uncertified printed copies of said Transcript of the Record on Appeal by printing 25 copies of the above-mentioned proceedings that were had, and papers that were filed in said cause in said Circuit Court of Appeals (items 2–12, *supra*), and by binding one of the latter printed copies of said proceedings, etc., at the end of each of the 25 extra copies of the printed record on which said cause was heard in said Circuit Court of Appeals.

A. H. KENYON,
SEABURY MERRITT,
S. M. STOCKSLAGER,
Counsel for Appellant.

Service acknowledged Sept. 10, '15.

EDWARD CANNON,
STILES W. BURR,
JOS. B. KERR,
Counsel for Appellees.

[Endorsed]: Praecipe for Certified Transcript of Record on Appeal to Supreme Court U. S. Filed Sept. 14, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

No. 2416. United States Circuit Court of Appeals for the Ninth Circuit. Andrew West, Appel-

lant, vs. Edward Rutledge Timber Company, a Corporation, and Northern Pacific Railway Company, a Corporation, Appellees. Filed Sep. 14, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees,

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record Upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and twenty-eight (128) pages, numbered from and including 1 to and including 128, to be a true copy of the complete record made pursuant to the praecipe filed by counsel for the appellant on the 14th day of September, A. D. 1915, under Rule 8 of the Supreme Court of the United States, in the above-entitled case; including the Assignment of Errors on Appeal to the Supreme Court of the United States, and of all proceedings had, and of all papers, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record on appeal to the Supreme Court of the

United States in the above-entitled cause as made and certified pursuant to the said praecipe.

ATTEST my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-fifth day of October, A. D. 1915.

[Seal] F. D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

(Canceled U. S. Internal Revenue 10-cent Documentary Stamp.)

[Citation on Appeal to Supreme Court U. S.]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees.

United States of America,—ss.

To Edward Rutledge Timber Company, a Corporation, and Northern Pacific Railway Company, a Corporation, Appellees:

You, and each of you, are hereby admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington, the District of Columbia, on the 13th day of November, A. D., 1915, pursuant to an order allowing an appeal filed and entered in the clerk's office for the United States Circuit Court of Appeals for the Ninth Circuit from a final decree signed, filed and entered on the 15th day of February, 1915, in that certain suit, being in equity, No. 2416, wherein Andrew West is complainant and appellant and you are defendants and appellees, to show cause, if any there be, why the decree rendered against said appellant, as in the said order allowing appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable WILLIAM W. MORROW, one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, this 14th day of September, 1915, and of the Independence of the United States the one hundred and fortieth.

WM. W. MORROW,

One of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Received copy and acknowledged service of the within copy this 4th day of October, 1915.

_____,

_____,

_____,

_____,

Solicitor for Defendant and Appellee, Edward Rutledge Timber Company, a Corporation.

_____,

_____,

_____,

_____,

CHARLES W. BUNN,

EDWARD J. CANNON,

Solicitors for Defendant and Appellee, Northern Pacific Railway Company.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellees.

United States of America,—ss.

We hereby accept service and acknowledge receipt of a true copy of the original Citation on Appeal issued in the above-entitled cause on the 14th day of September, 1915, hereto attached, this 16th day of October, 1915.

STILES W. BURR,

Solicitor for Defendant and Appellee, Edward Rutledge Timber Company, a Corporation.

[Endorsed]: Citation on Appeal to Supreme Court U. S. Filed Sept. ——, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

[Endorsed]: No. 2416. United States Circuit Court of Appeals, for the Ninth Circuit. Andrew West, Appellant, vs. Edward Rutledge Timber Companw, a Corporation, and Northern Pacific Railway Company, a Corporation, Appellees. Citation on Appeal. Filed Oct. 22, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

INDEX.

	Page
Act March 2, 1899	34-44
Act July 2, 1864	9
Act March 26, 1895	26
Act June 4, 1897	19-44
Act June 6, 1900	22
Act October 1, 1900	23
Act July 1, 1898	22-44
Am. & Eng. Enc. of Law. Vol. 23, p. 299	51
Burfenning vs. Chicago, Etc., Railway Co., 163 U. S., 221	17
Bonnett vs. Vallier, 116 N. W., 885	19
Commission vs. Ill. Central R. R., 215 U. S., 456.	17
Central Pac. Ry. Co. vs. Nevada, 162 U. S., 512	42
C. H. & E. R. Co. vs. Interstate Commerce Commission, 206 U. S., 154	17
Chilton vs. St. L. & Iron Mt. R. Co., 19 L. R. A., 269.	19
Comstolk vs. Northern Pacific Railway Co., 34 L. D., 88	22
Daniels' case, 43 L. D., 381	48
Dennis vs. National Bank, 38 Wash., 439-80, Pac., 764	19
Delany vs. N. P. Ry. Co., 45 L. D., 6	50
Ferguson vs. N. P. Ry. Co., 33 L. D.	12
Fairbanks vs. U. S., 181 U. S., 283	30
Fremont vs. U. S., 17 How., 557	31
Fleischner vs. Kubli, 25 Pac., 1089	19
Germania Iron Company vs. James, 89 Fed., 811	31
Gila Valley Globe, Etc. Ry. Co. vs. Hall, 232 U. S., 94	6
Houghton vs. Payne, 184 U. S., 66	30
Hanson case, 38 L. D., 491	24-46
Hewitt vs. Schultz, 180 U. S., 156	30
Hyde, F. A., et al, 40 L. D., 284	4-33
Harmon, Attorney General, 21 Ips., 486	10
Instructions Feb'y 14, 1899, 28 L. D., 103	
Instructions, 39 L. D., 116	26
Instructions, 28 L. D., 103	35
Instructions, 28 L. D., 521	35
Instructions, August 4, 1885, 4 L. D., 90	50

	Page
Idaho vs. N. P. Ry. Co., 42 L. D., 118	13
Interstate Commerce Commission vs. D. L. & W. R. R. Co., 220 U. S., 235	17
Interstate Commerce Commission vs. U. P. R. R. Co., 222 U. S., 541	17
Instructions, December 18, 1899, 29 L. D., 391	35
Instructions, November, 1909, 38 L. D., 287	20-25
Instructions, April 13, 1895, 20 L. D., 350	26
Jones vs. N. P. Ry. Co., 34 L. D., 105	13
Joint Resolution, 1870	9
La Bar vs. Northern Pacific R. R. Co., 17 L. D., 406	29
Leavenworth L. & G. Co. vs. U. S., 92 U. S., 733	39
Lockwood vs. Thorne, 11 N. Y., 175	18
Leet vs. N. P. Ry. Co., 37 L. D., 37	52
Moody, Attorney General, 25 Ops., 401	10
Miles vs. N. P. Ry. Co., Appendix	47
Montana Railway Co. vs. Warren, 137 U. S., 348	
Marquez vs. Frisbie, 101 U. S., 473	19
Morton vs. Neb., 88 U. S., 21	18
Northern Pacific Railway Company vs. Frei, 34 L. D., 661	22
N. P. Ry. Co. vs. Amacker, 175 U. S., 564	28-58
N. P. Ry. Co. vs. Boyd, 228 U. S., 482	10
N. P. Ry. Co. vs. U. S., 176 Fed., 706	10
N. P. Ry. Co., 33rd L. D., 634	22
N. P. Ry. Co, 40 L. D., 64	14
Old Jordon Milling Co. vs. Societe Anonyme, 164 U. S., 261	5
Platt vs. Union Pac. R. Co., 99 U. S., 558	34
Perkins vs. Hart, 11 Wheat., 237	
Rosen vs. U. S., 161 U. S., 29	5
Rogers vs. Hawley, 115 Pac., 687	38
St. Paul M. & M. Ry. Co. vs. Phelps, 137 U. S.,	528 51
Sutherland Stat., Consd., 2nd Ed., Sec. 388	51
San Pedro, Etc. Co. vs. U. S., 146 U. S., 136	5
Standard Oil Company vs. Van Etten, 107 U. S., 325	18
State vs. Redmond, 114 N. W., 137	19
State of Idaho vs. Northern Pac. Ry. Co., 37 L. D., 135	22

Page

Toland vs. Sprague, 12 Pet., 336..... 18
U. S. vs. Graham, 110 U. S., 219..... 51
W. G. Boyd, 228 U. S., 482..... 3
U. S. vs. Morrison, 240 U. S., 192..... 40
U. S. vs. MacDaniels, 7 Pet., 1..... 31
U. S. vs. Alabama, Etc. Ry. Co., 142 U. S., 615.... 32
U. S. vs. Landrum, 118 U. S., 85..... 35
U. S. vs. N. P. R. R. Co., 177 U. S., 435..... 51
U. S. vs. Montana Lumber Company, 196 U. S., 573..... 39
Warren vs. U. S. 137, U. S., 348..... 4
Wiggins vs. Burkham, 77 U. S., 129 (10 Wall.)... 18
Whitcomb vs. White, 214 U. S., 17..... 19
STATEMENT..... 1-4
ARGUMENT to..... 4-60
JURISDICTION OF THIS COURT to consider classification of land under Act of 1895..... 3
(a) As to right of Railway Company to select lands granted to the Railroad Company..... 1-4-8-10
(b) Questions go to foundation of right and are not matters of "practice and procedure" and Court has jurisdiction..... 4-7-16-29
Questions going to foundation of right may be considered though not urged in court below..... 6-17
11. Act of 1895 required Commissioners to classify *all* lands within limits of grant to company and not *odd-numbered* sections only..... 8-13
111. No evidence in the record proving right of the Railway Company to select and obtain title to lands granted to the Railroad Company.....9-11-12
(a) Franchise to be a corporation was mortgaged and sold and no Railroad Company in existence March 2, 1899..... 10
(b) No authority given to create a new corporation..... 8-13
(c) Railway Company a Wisconsin corporation organized before the Act of 1899, purchased property of Railroad Company..... 13
IV. No classification as non-mineral by the surveyor at the time of actual survey..... 15

Page

(a) Act requires a specific affirmative, positive *non*-mineral classification to be made by the surveyor to bring the land within the class prescribed in the Act. 15

V. No such description of land in the selection as required by the Act..... 16-20-29-38

(a) Description given so indefinite and uncertain as to be wholly void for any purpose..... 20-33-35-36

(b) Not a question of fact but one of law..... 17

VI. Circulars issued under the Acts of 1897 and 1898 not applicable to Act of 1899.....19-20-29

(a) They are public acts in the interest of settlers, entitled to liberal construction, while Act of 1899 is a private Act making a special grant to a corporation. 20-29

(b) No circular under Act of 1899 and none applicable to it. 21-44

(c) Department declined to apply them except in the matter of description..... 22

(d) District Court, Circuit Court of Appeals and Department all held such description not *generally* certain, but only when practically tied to lines of Government survey which is not the fact in this case. 21-43

(e) It is also held by them that it is not certain in itself, in any case..... 33

VII. No such Department practice as claimed by appellees 26-27-28

(a) Statute unambiguous and there can be no doubt as to the proper construction in such case and Courts disregard "practical construction," when it exists. 29-33-51

VIII. Provisions of Act of March 2, 1899..... 34

Congress did not use words to no purpose..... 34

IX. Impossible to identify lands described in terms of future survey, at any time prior to approval of Government survey..... 38-41

X. The Miles case, (Appendix "A" to Brief of counsel for appellees)..... 47-50

The Delany case..... 50

XI. The issues raised by the pleadings..... 55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 276.

ANDREW WEST, APPELLANT,

vs.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY CO., APPELLEES.

BRIEF FOR APPELLANT.

Statement.

We repeat the issues involved, as stated in our original brief, as follows:

> 1st. The grant having been made to the Northern Pacific *Railroad* Company, a great corporation created by Act of Congress, and to which the Government had theretofore granted approximately forty-three million acres of land, a part of which was to be reconveyed, could a selection be made

by the Northern Pacific *Railway* Company a separate and distinct corporation organized under the laws of Wisconsin, upon the ground that because of its purchase of the property of the *Railroad* Company under foreclosure sale, it was its successor in interest?

2nd. The land having been classified under the Act of February 26, 1895, as mineral, which classification was approved by the Secretary of the Interior March 26, 1901, a date prior to the selection by the company, and the surveyor having failed to make any classification in terms as non-mineral, was the land subject to selection by the company under the Act of March 2, 1899?

3rd. If the Railway Company was authorized to make the selection, and if the land was subject to the selection at the date it was made, was the description given of the land selected, in terms of a future survey, a compliance with the requirement of the statute that it should be described with *a reasonable degree of certainty*, so as to bar the rights of settlers in good faith without actual or constructive notice?

Counsel for appellees in their brief in answer state that although all of these questions were properly before the Circuit Court of Appeals in our Assignment of Errors and were likewise preserved on appeal to this court, the court cannot consider the first two questions for the reason they were not urged in argument below.

It is evident, however, counsel are in grave doubt of the correctness of this contention, for they somewhat elaborately argue these positions, devoting more than 20 pages of their brief to them. They refer to the case of Montana Railway Company vs. Warren, 137 U. S., 348, as supporting their contention.

As to our first proposition, after criticizing our lack of proper investigation, to learn just how, when, where

and by what means the Northern Pacific Railway Company became entitled to select land granted to the Northern Pacific Rail*road* Company, and especially our reference to Smalley's History of the Northern Pacific Railroad Company, and without attempting to controvert statements we made based upon that work, say: "It is not an authentic publication which the court will notice judicially for the purpose of getting information of what took place in the foreclosure proceeding." They do say, however, that the slightest examination of the book itself and of the proceedings through which the Northern Pacific Railway Company got its title, shows our "account of the facts and of the effect of these proceedings to be grossly inaccurate." *But, counsel do not in all the 61 pages of their printed brief venture to make a plain succinct statement of the proceedings by which the Railway Company got its title,* but content themselves with a reference to the case of Northern Pacific Railway Company vs. Boyd, 228 U. S., 482, as an adequate record of the steps by which the Railway Company got its title.

As to the second proposition, viz., that the land was classified as mineral, which classification was approved by the Secretary of the Interior, prior to the date of the selection, they dispute the finding of facts by the Commissioner upon which finding the decision in their favor was based, and which was affirmed by the Department. This finding of facts would be conclusive against the appellant. Does not the same rule apply to the appellees? However, counsel are mistaken. The records in the Mineral Division of the Office show the Commissioner's statement is strictly correct.

As to the last proposition, viz., that there is no such description of the land in the selection as the Act making

the grant clearly requires, they refer to the decisions of the trial court, the Court of Appeals and of the Department, which latter have not been uniform, together with the history of circulars issued by the Department in reference to claims to unsurveyed land, not one of which is applicable by its terms to the Act in question, and not one of which was based upon a similar statute, but all upon statutes requiring a liberal construction, instead of a strict construction as this Act does, and they also take the position that it is a question of fact and, therefore, the court is concluded by such finding. There is no attempt made in any of these decisions nor on the brief of appellees to answer the reasoning of the Department in the Hyde case, 40 L. D., 284, quoted from in our brief. Neither is there any attempt made to controvert our statement as to the erroneous and misleading statements of fact in the Departmental decisions referred to by us wherein it had the opportunity of correcting the errors on motion for rehearing, but failed to do so.

ARGUMENT.

II.

Referring to the contention of appellees that our first and second propositions cannot be considered because they were not urged in argument in the Circuit Court of Appeals and their statement that the decision of this Court in Montana Railway Company vs. Warren, 137 U. S., 348, settled the question, we invite attention to just what was said by the court in that case:

> "Error is alleged in the judgment of the Supreme Court of the Territory; and if in all matters presented to it, its rulings were correct, it

cannot be affirmed that the judgment was erroneous, because there were in the record matters *not vital to the question of jurisdiction or the foundation of right*, but simply a procedure, to which its attention was not called, and in respect to which its judgment was not invoked. All such matters must be considered as waived by the complaining party."

This question was again considered in case of Rosen vs. The United States, 161 U. S., 29, wherein Chief Justice White after stating that the charge was the indictment was absolutely void because it failed to give an identifying reference to that which the grand jury found to be obscene held:

> "If these objections be well founded, they are necessarily apparent on the face of the record. They go to the jurisdiction of the court *ratione materia*. They consequently demanded consideration whether or not they were presented to the court below, or have been regularly assigned for error here. Citing Montana R. Co. vs. Warren, 137 U. S., 348."

The principle involved was considered again in the case of Old Jordan Milling Company vs. Societe Anonyme, 164 U. S., 261. In that case Mr. Justice Brown speaking for the court said:

> "We have repeatedly held that the failure to present and insist upon errors assigned in the court below, constitutes an abandonment or waiver of all the errors so assigned, *not vital to the question of jurisdiction, or the foundation of the right*. Citing the Montana Railway Company case and that of San Pedro, Etc. Co. vs. U. S., 146 U. S., 136."

The latest case in which this question was considered, so far as we have seen, is that of Gila Valley, Globe, Etc. Ry. Co. vs. Hall, 232 U. S., 94, wherein Mr. Justice Pitney speaking for the court said:

> "The impropriety of allowing a party, conceiving himself to have suffered from an erroneous ruling of a trial court in a matter *not jurisdictional, nor essential to the foundation of the action*, but involving a mere matter of procedure, to invoke the judgment of this court thereon, without availing himself of the opportunity for a review thereof in the appropriate appellate court of the territory has been repeatedly pointed out. Citing all of the cases which we have hereinbefore referred to."

While it is true the Circuit Court of Appeals stated the question of the sufficiency of the description of the land was the only question urged in that court, and counsel in their brief insist this was the case, and that therefore no other question can be considered in this court, we beg to call attention to a quotation from page 30 of the printed brief filed by counsel for appellant in that court as follows:

> "We have also assigned as errors, that the court erred in holding and deciding that the Northern Pacific Railway Company had the right to exercise the rights of the Northern Pacific Railroad Company under this grant. We do not desire to argue this matter as a separate and independent assignment of errors, but we think this much will be conceded. That the Northern Pacific Railway Company can exercise no right in the premises except it be by the grace of the courts granted in this case through an exceedingly liberal construction, not only in the language of the grant, and as to the intention of

Congress in passing the Act in question, but as to the records of the Land Department, as well.

Where the equities of the case are so strongly with one of the parties as they are with the appellant in the case at bar, equity requires that the respondent shall be held to the strict letter of the law, and nothing will be permitted to be gained by it by construction. In other words, where a liberal construction would result in depriving one of that which in equity he ought to have, then the rule of liberal construction will be withheld and a rule of strict construction adopted in order that injustice may not be done.

Public policy requires that the rule of strict construction against the Railway Company under the grant contained in this act should prevail. The courts have adopted that rule and it is wholesome."

Moreover, we are informed by one of the counsel for appellant that this subject was presented in the oral argument before the court. It would seem to follow therefore that the court is hardly justified in its statement that the matter of description was the only one presented.

It seems to us the refusal of the court to consider matters not urged in the court below applies only to mere matters of procedure, such as the competency of witnesses, relevance of their testimony, exceptions to instructions and matters of that kind. It will be observed that in each case cited the court distinguished between this class of questions and those which go to the question of jurisdiction or the foundation of the right.

In the case at bar, will it be insisted that if, at the date of the grant to the Northern Pacific Railroad Company, the selections under which grant, is the foundation of the right of appellees, was not in existence, and, therefore, there being no grantee, the grant was void, belongs to

the "mere matter of procedure"? Clearly it goes to the foundation of the right to make the selection. Likewise, if the Railway Company was not qualified to make a selection under the grant to the *Railroad* Company, then there is no valid foundation for its claim.

III.

Again, if our second contention, viz., that at the date of selection the land had been classified as mineral under the Act of 1895, and this classification approved by the Secretary of the Interior prior to the date of the selection, then the land was not subject to selection and no valid title could be acquired thereby is correct, is it a mere matter of procedure? That this goes to the foundation of the right also, seems to us perfectly clear.

IV.

Assuming then that these propositions which go to the root of the right of the Railway Company, and, therefore, may be considered although not presented in argument in the court below, we shall address ourselves to the first of these, viz., that there was no Northern Pacific Rail*road* Company in existence at the date of the Act of March 2, 1899, making the grant to that Company, and, hence there was no grantee in existence and the grant is absolutely void.

In our original brief, we referred to the authorities holding that in such case the grant must fail, and as counsel do not dispute the correctness of this position, we shall assume that we need only to discuss counsel's denial of the facts stated.

Just how the Northern Pacific Rail*road* Company continued to exist after the authorized mortgage and sale

of *the franchise of that company to be a corporation,* neither the decision in the Boyd case nor anything in the answer to the complaint, nor in appellees' brief, informs us.

It is stated that all the lands were not sold under the foreclosure sale in New York in 1875. But, the *franchise to be a corporation was sold and bought by a committee of the bondholders.* Counsel do not question the statement in the opinion of the Attorney General Harmon that after the sale of the franchise to be a corporation "the counsel in charge of the reorganization were certainly justified under the decisions in advising a new act of incorporation, instead of endeavoring to work out a transfer of the corporate existence of the old company to the new one through the foreclosure proceedings."

Under this opinion patents to lands granted to the Railroad Company were issued to this new company—the Northern Pacific Railway Company, as its successor in interest. That the change, which they are pleased to call a "reorganization" took place before the date of the grant of 1899, is not disputed.

The granting Act of 1864 prohibited the mortgage of the property of the company without the consent of Congress. The Joint Resolution of 1870 gave that consent, but *did not provide for any new corporation after the sale of the federal franchise to be a corporation,* which franchise was also authorized to be mortgaged and was mortgaged and sold. What is the legal effect upon the grant of 1899? Counsel in their brief, like the cuttlefish, have succeeded in "muddying the waters," but so far as we are able to discover, have vouchsafed no explanation of this question.

We have nothing to do here with the question whether the conveyance of the land to the United States under

the provisions of the Act, conveyed a valid title. Neither is it important whether the Railway Company is entitled, as the successor of the Rail*road* Company to patents to lands under the grant of 1864, as held by the Attorney General. But it is *vitally* important to know whether there was in existence any Northern Pacific Rail*road* Company on March 2, 1899. If there was not, the grant must fail whatever be the consequences. Counsel are painfully silent on this point although it was pressed in our original brief which they were answering.

Counsel seem to take some satisfaction in criticising our statement that all of the property and the franchises including that to be a corporation, were sold under the foreclosure suit in New York in 1875, and suggest that had we not cared to examine the records of the court in that case, we might at least have examined the case of Montana vs. Boyd, supra, which furnished a sufficient record statement of the facts. While counsel thus find fault with us they set out at page 8 of their brief, the opinion of Judge Dietrich on this point wherein he stated:

> "At the present time the question appears to have been the subject of investigation, and it has been repeatedly held that as a result of foreclosure proceedings consummated prior to the passage of the Act of 1899, the Railway Company acquired *'all the property rights and franchises* of the Rail*road* Company. 21 Ops. Atty. Gen., 486; 25 Ops. Atty. Gen., 401; Ferguson vs. Northern Pacific, 33 L. D., 634. See also Northern Pacific Ry. Co. vs. U. S., 176 Fed., 706; Northern Pacific Ry. Co. vs. Boyd, 228 U. S., 482. It therefore appears that the construction contended for by the plaintiff would render the act nugatory. For if this conclusion is correct, and admittedly it is not open to review upon the record here, it turns out that at the time the Act of 1899 was passed, the Railroad

Company was not possessed of the lands desired by the Government, but that its right thereto had passed to the Railway Company."

We hardly deem it necessary to pursue this subject further since the very authorities which counsel for appellees cite settles the question in favor of our contention.

Counsel are also in error in assuming we did not make diligent and persistent efforts to get at the real facts growing out of the two foreclosure suits and sales and the creation of the Railway Company. We examined every paper in the New York foreclosure action and had copy of the record of the Wisconsin court. In addition to which, for nearly a year we have had those in charge of the records in the Interior Department, including the records of the former Bureau of Railroads search for any papers on files which would show when, where, and in what manner, the Northern Pacific Federal Charter ceased to exist and when, where, and in what manner, the Northern Pacific Railway Company was created and, as alleged, became the successor in interest of the Railroad Company. But so far, all efforts have failed and we have been unable to get any information from the Department. We examined in the New York Public Library the literature of the Railway Company in the hope of finding something definite, but instead we found the present company referred to as the "reorganized Railway Company." And now, after a careful examination of the brief of counsel for appellees and the authorities to which they refer, we are still without light upon these questions.

The Railway Company has been for years receiving patents to lands granted to the Railroad Company as its successor in interest. And yet, where lands are classified as mineral by the Act of 1895, which prohibits the

Railroad Company *or anyone holding under it* from receiving patents to lands thus classified after the approval by the Secretary of the Interior, the Railway Company has been given patents to lands to which the Railroad Company or persons holding under it, could not get patents, upon the ground that the Act of 1899, was a special Act and that the prohibition against the Railroad Company and those holding under it in the Act of 1895, did not apply to the Railway Company's selections under the Act of 1899. If the court can reconcile these positions it is more than we have ever been able to do.

The company has asked, and the Department has granted it, the right to select and obtain patent under the Act of 1899 to lands granted to the Northern Pacific Railroad Company upon the ground that it is its successor in interest and yet the company has insisted and the Department has uniformly declined to hold it was bound by the limitations placed upon the Railroad Company and those holding under it. This, it seems to us, to say the least, is inconsistent.

In the case of Ferguson vs. The Northern Pacific Railway Company, 33rd L. D., 634, Secretary Hitchcock held:

> "With regard to the relinquishment contemplated and authorized by the Act of March 2, 1899, supra, as before stated, it was duly executed and filed as required by the provisions of Section 3 of the Act, and was accepted by the Department as sufficient. Thereupon, the right of lieu selection of an equal quantity of other lands, as provided for in the Act of 1899, *became a part of the general grant made in aid of the construction of the Northern Pacific Railroad* and, as, under the opinion hereinbefore referred to, given by the Attorney General, application for patent.

by the Northern Pacific Railway Company to be acted upon exactly in the same manner as though the applications had been made by the old Northern Pacific Railroad Company. Cited in Jones vs. Northern Pacific Ry. Co., 34 L. D., 105.

It will be noted the Joint Resolution of 1870 was neither a repeal nor an amendment of the Act of 1864, which act prohibited the execution of a mortgage by the company without the consent of Congress. It merely gave that consent. After the execution of mortgages under this permission, the foreclosure and sale of property and franchises including the franchise to be a corporation, in 1875, was not the power to mortgage exhausted? If so, the mortgages executed subsequently by that company and foreclosed in Wisconsin in 1896, were without the consent of Congress. It might have been otherwise, perhaps, if the prohibition in the Act of 1864 had been repealed.

V.

Counsel do not dispute our position that the Act of 1895, by its plain, unambiguous terms required the Commissioners to classify *"all lands,* within certain prescribed limits, within which limits the land in controversy lies. They rely upon a letter of instruction to the Commissioners by the Commissioner of the General Land Office, approved by an Assistant Secretary, confining their classification to odd numbered sections only, and seek to ignore all others. While it may be conceded the Department has power to make rules and regulations to carry out the provisions of the law, it has absolutely no power whatever to make any rule or regulation ignoring or defeating the plain provisions of the statute. Idaho vs. N. P. R. Co., 42 L. D., 118, at bottom of

page 122. That this is undertaken in the instructions of June 25, 1895, upon which counsel relies, is too plain to require argument. But even if such instructions had not been in open violation of the positive terms of the statute, it was impossible for the Commissioners to follow them, for the reason that they could not and did not know, until after survey the locus of odd or even numbered sections and hence *they were not followed*, and the classification made included them, and was approved by the Secretary.

Counsel is also mistaken in the statement that such classification is fatal to our client's case. It is the Railroad Company and those holding under it only, who are prohibited from obtaining title to lands thus classified. The classification would not prevent a settler from attacking it. It is conclusive only against the road and those holding under it.

Counsel at page 15 of their brief quote from the statement of the trial court of West's contention, as follows:

> "Precisely stated it is that the land was not expressly classified as non-mineral by the surveyors in the field; it is not claimed that it was returned as mineral nor is there now any question that it was in fact non-mineral."

If by this statement the court and counsel can be understood to hold that if the land was not returned as mineral, and as it is now known it is non-mineral, is a compliance with the provisions of the law, we must say that we cannot agree with them.

In the case of N. P. Ry. Co., 40 L. D., 64, in construing this Act the Department held:

> "It is true that the land selected by the company may not in fact be mineral but under the

terms of the Act which authorizes the company to select lands in satisfaction of those relinquished by it, it is not believed that the Department can inquire into the question as to whether or not the lands are mineral where they are not classified as non-mineral by the return of the surveyor."

The present contention of counsel is that the statute offered an option and when accepted it constituted a contract. Even if this view is right and instead of being designated a grant it be held to be a legislative option contract, still the acceptance must be precisely as stated in the Act. The offer was to permit the selection in lieu of lands conveyed of a certain class of lands, to be determined, not by the Commissioner, nor by the Secretary, but *by the surveyor* at the time of *actual survey*. It is thus seen the statute fixed the *only kind of land* the Government would permit the company to take, that is, land *classified* as *non-mineral* by the surveyor. It is doing violence to the terms of the statute creating a positive and conclusive limitation, to say that if the surveyor does not return it as mineral, it is "equivalent" to a classification as "non-mineral." To put this proposition in another way, if the surveyor makes *no* classification whatever it is a compliance with the law, a classification as *non-mineral*, and the company is entitled to select it. We may be pardoned for saying that to us, this is most illogical, especially when under all the canons of construction the Act requires a strict construction and the land must be affirmatively shown to be of the exact class, and only class, offered in exchange.

The position assumed that because the surveyor returned the land as suitable for grazing but at present more valuable for its timber, it is an affirmative non-mineral classification, seems to us utterly untenable and

unreasonable. It might be the land department has for the purpose of disposing of the lands under the general laws permitted lands thus described to be entered as agricultural lands, since, under these statutes the character of the land is always open to attack notwithstanding the holding of the office that it is non-mineral. Not so under this Act, but a positive affirmative non-mineral classification by the surveyor is absolutely necessary to bring the land within the purview of the statute. Without such positive classification it is no more the class of land offered in exchange by the Act, than would be land positively known to be mineral. The statute is the measure of the right of the company and must govern whether the terms be hard or lenient.

VI.

Counsel for appellees, while admitting the question of the sufficiency of the description in the selection, was presented to the Circuit Court of Appeals and properly assigned as error on appeal to this court, yet insist it is a question of *fact*, and, therefore, the finding of its sufficiency by the Land Department is conclusive on the courts. They cite a number of authorities to sustain this contention. Evidently the Circuit Court of Appeals did not take this view, for, in concluding its opinion after going into the question fully, that court said:

> "But if this is true as a general rule, nevertheless, for the reasons above stated, the description in the present case in terms of future survey, under the conditions existing, designates the land sought to be selected with a reasonable degree of certainty. That being the single question urged here for our decision, the decree of the District Court is affirmed with costs to the respondents."

Counsel cite the cases of Interstate Commerce Commission vs. Ill. Central R. R., 215 U. S., 452; Interstate Commerce Commission vs. D. L. & W. R. R. Co., 220 U. S., 235; Interstate Commerce Commission vs. U. P. R. R. Co., 222 U. S., 541.

An examination of these decisions show that the Interstate Commerce law specifically makes the finding of facts by the Commission *prima facie* correct. Moreover, in the latest case cited, that of the Commission vs. U. P. R. R. Co., supra, the court stated the issues involved as follows:

> "These appeals raise the single question as to whether in making the 45-cent rate, the Commission acted within or beyond its power * * * the statute makes its finding prima facie correct. Cin. H. & E. R. Co. vs. Interstate Commerce, 206 U. S., 154."

The case of Burffening vs. Chicago, Etc., Ry. Co., 163 U. S., 221, quoted from by counsel was a question of the invalidity of a land patent. Counsel quote what the court said as to the class of questions which the courts hold are made conclusive by the finding of the Land Department, but they fail to quote what followed it in the opinion, viz.:

> "But it is also equally true that when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent transfer no title and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

The court cites a number of cases including that of Morton vs. Neb., 88 U. S., 21, where the question was whether lands were saline in character.

In the well considered case of Wiggins vs. Burkham, (77 U. S., 10 Wall., 129), this court held:

> "The proposition that what is reasonable time in such case is a question for the jury, as laid down by the court below, cannot be sustained. Where the facts are clear, it is always a question exclusively for the courts. The point was so ruled by this court in Toland vs. Sprague, 12 Pet. 336. See also Lockwood vs. Thorne, 11 N. Y., 175 and 2 Pars. Cont. Note c 661. Where the proofs are conflicting the question is a mixed one of law and of fact."

In the case of Standard Oil Company vs. Van Etten, 107 U. S., 325, the court held:

> "It is next objected by the plaintiff in error, that the court below erred in its rulings upon the account offered and admitted in evidence and which, it was claimed was a stated account. The claim on this part of the case is, that an account rendered becomes an account stated, unless objected to within a reasonable time; that what constitutes a reasonable time in such a case is a question of law; and that an account stated cannot be impeached except for fraud or mistake, and in support of these propositions, counsel cite Perkins vs. Hart, 11 Wheat., 237; Toland vs. Sprague, 12 Pet., 334; Wiggins vs. Burkham, 77 U. S., 884; Lockwood vs. Thorne, 11 N. Y., 170, and other cases.
>
> There is no dispute but that this is a correct statement of the law and it is precisely what is charged by the Circuit Court."

The courts have universally held that where the facts are all admitted or undisputed, that what is "reasonable" within the meaning of any given statute, is a question of law for the courts. Chilton vs. St. L. & Iron Mt. R. Co., 19 L. R. A., 269; 9 Cyc., 591; Dennis vs. National Bank, 38 Wash., 439; 80 Pac., 764; Fleischner vs. Kubli, 25 Pac., 1089; Bonnett vs. Vallier, 116 N. Y., 885; State vs. Redmond, 114 N. W., 137.

Where there is a mixed question of law and fact, and the court cannot so separate it, as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. But if it can be made entirely plain to a court of equity that, on facts about which there is no dispute or reasonable doubt, the officers of the Land Department have, by a mistake of law, deprived a man of his right, it will give relief. Marquez vs. Frisbie, 101 U. S., 473; Whitcomb vs. White, 214 U. S., 17.

In the case at bar, there is no dispute as to the facts and has never been any. It follows that even if the court should hold it is a mixed question of law and fact, there can be no difficulty in separating them and determining whether there has been a mistake of law made upon the admitted facts.

VII.

As hereinbefore stated, counsel rely upon the circulars issued under the Act of 1897, known as the "Forest Lieu Act," and the Act of 1898, for the adjustment of the company's grant, as construed and applied by the Department the trial court, and the Court of Appeals in this case in support of the sufficiency of the description in terms of a future survey, characterized by First As-

sistant Secretary Jones as an "expected or hypothetical description," 42 L. D., 259.

If we start right in pursuing this subject, we shall have but little trouble in arriving at a correct conclusion. There are only two *possible* descriptions of public lands. One a description *in fact*, which is a marking on the ground or a reference to monuments or natural land marks; the other is a *description in law*. The latter is only possible after the approval of the survey of the land by the Commissioner. Prior to that time, there is no official survey and consequently no official description or designation is possible. U. S. vs. Morrison, 240 U. S., 192.

The selection by the company in this case is neither a description in fact nor one in law. In point of fact it does not purport to be a *description* of land. It is only a designation of a certain number which some unknown quantity of land may bear after the official survey which is based upon a marking on the ground. Neither is anyone, except, possibly, counsel for appellees, bold enough to assert that in itself it is a sufficient description for any purpose whatever. The Circuit Court of Appeals while sustaining the description did it in defiance of what it laid down in the decision as the correct rule. At page 110 of the record, after giving the Century Dictionary definition of the word "designate" used in the Act, it is said:

> "A description by legal sub-division is a perfectly intelligible designation of a tract of land; so it must follow that a description which will be a legal sub-division when surveyed, if lying ***adjoining*** a sub-division, already surveyed, is also a perfectly intelligible description."

And yet the court applied the description to a tract three miles distant from any surveyed line over a mountainous, heavily timbered country, which line, as we have shown, had nothing whatever to do with the location of this land.

Again, in the same decision at page 109, the court said:

> "It may be conceded, in so far as it respects this case, that a description of a section or a quarter section by legal sub-divisions in the fastnesses of the Cascades or Rocky Mountain Ranges, far distant from any Government survey, *or even generally,* that a description in terms of future survey, is not such a description as is contemplated by the statute."

The trial court held that such a description was sufficient when the land was located in the "immediate vicinity" of an established line of survey.

It follows that although sustaining the description both courts held it was not sufficient in itself, and the Circuit Court of Appeals held it was not generally such a description as contemplated by the statute, but was intelligible if lying "adjoining" an established line of survey.

Counsel, quoting the decisions of the trial court and the Circuit Court of Appeals and certain decisions of the Department, seek to apply the provisions of the circular under the Act of June 4, 1897, to the selection in this case.

It is conceded that prior to November 3, 1909 (38 L. D., 287), no *general* instructions as to the selection of unsurveyed lands was ever issued, but prior to that time special instructions were issued in the administration of

numerous acts, such as the Valentine Scrip Act, Sioux Half Breed, and perhaps some others, but no general circular, and none was issued under the Act of March 2, 1899.

In the thoroughly considered case of the State of Idaho vs. Northern Pacific Ry. Co., 37 L. D., 135, involving the claim of the State under the Act of 1894, the Railway Company, under the Act involved in this case and certain settlers, the Department in a very elaborate decision, among other things, stated:

> "The State seeks to apply the same rule to selections made under the Act in question that is applied to selections made under the Act of June 4, 1897, and June 6, 1900. The instructions issued under said Acts were not intended to govern selections made under other acts. Comstolk vs. Northern Pacific Ry. Co., 34 L. D., 88."

In the same case, referring to the Act of July 1, 1898, the Department held:

> "The State to sustain its position that the construction of the Act of March 2, 1899, supra, is controlled by the construction placed by the Department upon the Act of July 1, 1898, takes the ground that the two statutes have a common purpose, and the language used in Departmental instructions of February 14, 1899, (28 L. D., 103), and decision rendered in the case of Northern Pacific Railway Company vs. Frei (34 L. D., 661), is quoted and relied upon. *The circular referred to was issued prior to the passage of the Act of March 2, 1899, and it is clear the directions therein contained can have no reference thereto.*"

In the Comstolk case cited, construing the Act of June 6, 1900, confining lands selected under the Act of June 4, 1897, to surveyed lands, the Department held:

"It will be noted that by the terms of said Act (June 6, 1900), it applies only to selections made under the provisions of the Act of June 4, 1897, and not to those made under the Act of March 2, 1899, in question. * * * Said Railway Company therefore was not confined in making selections after October 1, 1900, under the Act of March 2, 1899, to surveyed lands."

The Department thus clearly distinguishes between the Acts of 1897 and that of 1898, and the Act of March 2, 1899, and declined to apply the very same circulars which it afterwards applied and which the Circuit Court of Appeals applied to the Act of March 2, 1899. In order to protect the company against the confining of selections under the Act of 1897, to surveyed lands, as well as the repeal of that statute in 1900, it was held neither of these acts nor the circulars issued under them applied to the company so as to prevent its selection of unsurveyed lands. But, when it came to a question between the Railway Company and settlers, both the Department and the court applied these circulars to the selection which it is admitted was not sufficient in itself but must be bolstered up by these circulars applicable to other acts and which, the Department declined to apply to it when it affected the interests of the company.

While the Department, the court and counsel for appellees, all insist that the circulars under the Acts of 1897 and 1898, particularly that under the Act of 1897, is broad enough to cover all selections, the fact remains that the Department, on November 3, 1909, (38 L. D., 287), issued a circular applying to all applications and selections for and filings and locations upon unsurveyed lands. If this circular under the Act of 1897 was broad enough to cover all such cases, why issue a general circular for that purpose? We have seen the Department

had in at least two cases held it was not broad enough to apply to the statute involved in this case. It will also be noted this general circular requires a very specific description of the land by metes and bounds, with courses, distances, and reference to monuments by which the location of the tract on the ground can be readily and accurately ascertained. It also requires posting on the land and an approximate description of the land by sections, town and range. Moreover, it is *specifically made retroactive on its face.*

An examination of the record in the Land Department will show that counsel in this case urged in the Department that the regulations relating to selections under the Act of June 4, 1897, have no application whatsoever to selections under the Act of July 1, 1898, or March 2, 1899.

If this view is right and this circular is not applicable, and it is conceded the land is not adjoining or nearer than three miles of any surveyed line, and it being conceded also the description is not sufficient in itself, we hardly see upon what ground it can be defended.

It seems to us the Interior Department has not been quite fair to the settlers in these cases where their homestead claims are in conflict with the selections by this company. This is true both as to its decisions and its erroneous statements, or failure to make statement, of clearly established facts.

In the Hanson case (38 L. D., 491), which included the West case and ten others whose joint petition was considered in that decision and all ruled by it, the Department said:

> "Only one pertinent question raised by the motion is left for present consideration. This is the

question of the alleged insufficiency of description. The only description given by the Railway Company of lands selected herein was of 'lands which when surveyed will be described as follows', etc. There were no monuments upon the ground and no location of the land by reference to natural monuments, and nothing to give notice to settlers that the land had been appropriated by selection under the Act of March 2, 1899. At the time this motion was entertained this Department had grave doubts as to the sufficiency of such description as against the claim of a settler subsequently initiated, and there was under contemplation then the formulation of regulations which would give more precision to such selections and afford settlers greater security in the matter of initiation of claims for such land. Since that time that subject has been carefully considered by the Department and regulations have been issued which will give such precision and afford such security. (Circular of Nov. 3, 1909, 38 L. D., 287.) It appeared, however, that the practice of allowing selections by the Railway Company as those selections were made had been of such long standing and such uniform practice that it would be unfair, if not illegal, to give retroactive effect to such regulations."

The unfairness in this statement is that, in point of fact, there was no such practice either uniform or of long or short standing. If there had been, the Department would have been quick to point to this or that decision of the Department so holding; or that the question was presented to the Commissioner in such and such cases and this description was held to be sufficient and subsequently followed in other cases. Or that this or that circular under other Acts had been applied. But no, not a reference is made, but simply the bald statement: "*It appeared*, however, that the practice, etc." Of course

it would have been entirely practicable to refer to any such decision if there had been any. But there were no such decisions and in point of fact this Hanson case was the first case in which this question was presented and there were no precedents whatever. The Department was in grave doubt and sustained a motion for rehearing and we believe oral argument was submitted before this most unusual conclusion was arrived at.

In fact the only circular in existence at that time involving the land in this case was the circular under the Act of 1895 for the classification of this identical land (20 L. D., 350), which directed the Commissioner in the classification of unsurveyed lands to—"observe the difference that the land must necessarily be described by natural objects and permanent monuments to identify the same."

The instructions issued by First Assistant Secretary Pierce July 26, 1910, (39 L. D., 116), for carrying into effect the extension of the Act of 1895, dated June 25, 1910, repeated this instruction as to unsurveyed land to be classified by the Board.

Again when the Daniels' case, cited by the court below and by counsel for appellees was argued orally, we challenged counsel and asked the First Assistant Secretary and his assistants, together with the Commissioner of the Land Office, to point to any decision recognizing such practice. They failed to do so and in the decision none was pointed out. We still insist there never was any such practice until the decision in this case under the title of the Hanson case.

That there was no such practice, and no *precedent* even tending to sustain this position taken by the Department and followed by the courts we beg to refer to

the quotation from the letter of First Assistant Secretary Adams found at page 49 of our original brief as follows:

> "In conclusion I have to say that in the study of the various Acts of Congress, above mentioned, I was profoundly impressed with the thought that while they permitted and authorized the initiation of claims to unsurveyed lands, they all evidently contemplated that such lands should be identified in some appropriate and effective way. There is nothing in any of these acts justifying another conclusion. If, in the administration of these laws, *it has been assumed that identification* would be accomplished by such description as is now contended for *on the ground of precedent, such assumption was unwarranted.*"

Here is a plain unmistakable statement by the Department that any assumption that in the administration of any of the laws authorizing the initiation of claims to unsurveyed lands, could be identified by a description in terms of future survey, on the ground of *"precedent,* was *unwarranted."* This is a clear statement of fact which never has been, and cannot be successfully refuted and is decisive of the question against the contention of appellees. Their quarrel must be with Secretary Adams as well as with us.

Moreover, although, as set out, a circular was issued November 3, 1909, which it is admitted did "afford settlers greater security in the matter of initiation of claims for such land," which, by its terms is made retroactive, the Department held "it would be unfair if not illegal to give retroactive effect to such regulations." The direction given by the circular is as follows:

> "You will hereafter reject any such application selection, filing or location, under whatsoever

law permitted, unless it conforms to the following rules."

Then follows drastic rules for both a metes and bounds and an *approximate* section, town and range description, together with posting upon the land.

Why unfair to make this regulation retroactive against the company? It is admitted no instructions had ever been issued under the Act by which it might have been misled. Neither is there any pretense that the Company has any equities whatever, nor had it at the time any vested right, nor is there any claim that it would be injured if the selection was held to have been insufficient, for the reason that it has never expended a dollar on the land and its scrip could be withdrawn and is more valuable to-day than when it was located. The equities are all on the other side in favor of the settler, but no consideration whatever seems to have been given his rights. See the doctrine enunciated by this court in the case of N. P. Ry. Co. vs. Amacker, 175 U. S., 564.

Why illegal to apply it in a case where the Department was making the first decision governing selections under the Act? It cannot be said that the Department has no power to make such requirement retroactive, particularly where no other instructions had been issued which could possibly make it unfair or unjust to do so, and the instructions are made retroactive on their face. It was not considered either unfair or illegal by Secretary Lamar to issue a drastic circular August 4, 1885, (4 L. D. 90) requiring all railroad companies to specify losses in their indemnity selections tract for tract, instead of in bulk as had been a uniform and long established practice. The Commissioner was directed to be careful to see that the rule was strictly complied with, and was directed to reject all selections not made in conformity thereto.

In the case of La Bar vs. Northern Pacific R. R. Co., 17 L. D., 406, Secretary Smith held:

> "The requirements of the order of August 4, 1885, must be enforced, and the companies required to specify a base not only for pending selections, but *for all selections heretofore approved* on account of which no previous loss has been assigned."

In that case it was held the company abandoned its selection list of 1883 by filing the list of October 12, 1887, and the previous decision denying La Bar's right was recalled and vacated and he was permitted to make entry of the land. It was held by Secretary Smith that this order not only applied to all selections made but to cases where selections had been approved and the companies were required to submit new assignments tract for tract.

VIII.

In this case counsel for appellees devote much space to this question, insisting that the company complied with the practice established by the Department and that in a question of "*practice and procedure* merely," it cannot be deprived of its rights upon the ground that the construction of the statute was ill-advised and that a different mode of procedure should have been prescribed. They contend, to hold otherwise would be to penalize it for its obedience to the rules laid down by the officers to whom the administration of the law is confined.

There might be some force in this position, but for the fact there was *no* "practice and procedure" under this statute. If counsel could show that a circular of instructions had been issued under the statute, which had been

complied with, they might have some reason to complain, but it is admitted there was not at the date of the selection, nor at any time thereafter, any such circular. Neither could any departmental decision under the Act be pointed to as establishing a practice, especially in a case where the matter was contested. But even in such case, this court, in the case of Hewitt vs. Schultz, 180 U. S., 156, Mr. Justice Harlan speaking for the court said:

> "It is a settled doctrine of this court that the practice of a department in the execution of a statute is material only where doubt exists as to its true construction."

In Fairbank vs. U. S., 181 U. S., 283, Mr. Justice Brewer speaking of such construction said:

> "Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was *no doubt* we have steadily declined to recognize any force in practical construction. Thus before any appeal can be made to practical construction, it must appear that the true meaning is doubtful."

In Houghton vs. Payne, 184 U. S., 66, this court speaking through Mr. Justice Brewer said:

> "It is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. It is a rule of interpretation, but not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction."

In Freemont vs. U. S., 17 How. 557, Chief Justice Taney, speaking of such construction said:

> "It has always been held that it is for the court to decide what weight is to be given to information obtained from any of these sources."

The cases of Germania Iron Company vs. James, 89 Fed., 811, and the same case on second appeal, 107 Fed., 597, upon which counsel rely and from which they quote extensively, involved one of the established "Rules of Practice," of the Department. This is very different from an unidentified, supposed practice not based upon any rule, regulation, circular or even contested decision.

But what counsel term "the great leading case on the subject" is that of U. S. vs. MacDaniel, 7 Pet., 1. Counsel say that in that case "there was no specific rule, regulations, or decision sanctioning such payments, the matter was merely one of customary usage and practice in the Department."

The court, after stating that the duties performed by the defendant were necessary for the public service, that the payments by him were legal, and being made under the immediate direction of the Secretary of the Navy, errors were avoided which might have occurred under other circumstances, said:

> "It must be admitted that there was no law authorizing the appointment of the defendant, nor was it considered necessary that there should be a special statutory provision on the subject. For the convenience of the officers of the Navy and others who were engaged in the service of the Department, certain disbursements became necessary; and as no law specially authorized the appointment of an agent for this purpose, they were required to be made by a clerk."

Further on, the court said:

> "If some legal provisions be necessary to sanction the payment of the compensation charged, application should be made to Congress by the head of the Department, who required the service and promised the compensation. But no such provision is necessary. For more than 15 years the claim has been paid for similar services, and it is now too late to withhold it for services actually rendered. It would be a novel principle to refuse payment to the subordinates of a Department because their chief under whose direction they had faithfully served the public, had mistaken his own power, and had given an erroneous construction of the law. But the case under consideration is stronger than this. It is not a case where payment for services is demanded, but where the Government seeks to recover money from the defendant to which he is equitably entitled for services rendered. This court cannot see any right either legal or equitable, in the Government, to the sum of money for the recovery of which this action was brought."

It will be observed also that the court held that the construction of the law by the Secretary of the Navy was correct. It seems to us, therefore, that this decision is not in point in this case.

Counsel quote from the decision of this court in U. S vs. Alabama, etc., R. Co., 142 U. S., 615, the language of Mr. Justice Brown, citing and approving the MacDaniel case. Counsel, however, omitted the most important paragraph in that decision, which is as follows:

> "We think the contemporaneous construction thus given by the Executive Department of the Government, and continued for nine years through six different administrations of that

Department; a construction which, though inconsistent with the literalism of the Act, *certainly consorts with the equities of the case,* should be considered in this suit."

In that case also the court held the words of the statute were susceptible of three constructions. We hardly think it will be held the Act of 1899 is susceptible of three constructions, nor can it be made to appear that the equities are with the Railway Company. Moreover, there has been no uniform construction of this Act through six different administrations. In the Hanson case, which is the case at bar, supra, dated March 16, 1910, the Department stated that when the motion for review in that case was entertained (June 9, 1909), the Department had grave doubts as to the sufficiency of the description as against the claim of a settler subsequently initiated, and that on November 3, 1909, a general circular had been issued requiring a more definite description, but declined to consider it was retroactive.

Again, in the case of F. A. Hyde, et al, decided October 6, 1911, (40 L. D., 284), under Secretary Fisher's administration, after a very thorough consideration of the question of such a description under the Act of June 4, 1897, which did not require the strict description required by the Act of 1899, it was held it was insufficient and that the land could not be *sufficiently identified* for anyone to make an affidavit that it was "unoccupied" as required by the statute. It follows that there has not been a uniform construction of the statute. The decision of the Hyde case remained the settled doctrine of the Department from October 6, 1911, until changed August 3, 1914, in the Daniels' case, 43 L. D., 381, and as there has been no change in the administration since that time, it is perhaps acted upon at this time.

IX.

The Act of March 2, 1899, authorized the selection by the Northern Pacific Railroad Company in lieu of certain lands belonging to it to be conveyed to the United States, the selection of

> "An equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual Government survey, which has been or shall be made of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection."

Section 4 provides:

> "In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform to the lines of the official survey, the said company shall be permitted to describe such tracts anew, so as to secure such conformity."

In the case of Platt vs. Union Pac. R. Co., 99 U. S., 558, this court said:

> "Congress is not to be presumed to have used words for no purpose.
>
> The admitted rules of construction declare that a legislature is presumed to have used no superfluous words."

In the case of U. S. vs. Landram, 118 U. S., 85, this court said:

> "Every clause in a statute should have effect, and one portion should not be placed in antagonism to another."

These would be proper rules of construction in any case and certainly their strictness should not be ignored or modified in favor of a grant to a private corporation by the Government of the property it holds in trust. No departmental decision nor that of the trial court nor of the Circuit Court of Appeals has ever held the description of a tract of unsurveyed land in terms of a future survey, is, in itself, a compliance with the plain unambiguous requirements of this statute. The extreme in that direction to which any decision has gone, is that in a few instances it is possible the certainty required might be attained through extraneous surroundings.

Even counsel for appellees do not insist it is sufficient in itself but they rely upon these decisions of the Department, of the trial court and the Circuit Court of Appeals, together with the circulars of instructions cited and construed therein, which were issued under the Act of 1898, dated February 14, 1899, (28 L. D., 103), and that under the Act of June 4, 1897, dated May 9, 1899, (28 L. D., 521), none of which considered such description as applicable in all cases, and confined its applicability to cases in the "immediate vicinity," or in the "*vicinity*" of established lines of survey. Moreover the circular of May 9, 1899, was specifically revoked by the circular of December 18, 1899 (29 L. D., 391). Under the same act, which latter circular *was in force* at the *date of selection* and required *posting* on the land and in the local office and by publication, neither of which was done in this case.

Congress did not use words for no purpose. What then was its purpose in requiring the company in selecting unsurveyed lands, which they were in no sense bound to select, but selected only as a matter of choice, to designate them with *"a reasonable degree of certainty,"* most unusual descriptive words in a granting act? And what was its purpose in providing for filing a new list after survey, and also in permitting it to make the description conform to the survey? Was it for the benefit of the company only? Certainly not, for, unless it was to protect it against the initiation of other claims, the requirement of the new list would be absurd and of no possible use to the company, for the selection could have been just as well made after the survey. To hold otherwise is to make Congress use words to no purpose.

No, it was clearly to require such a description as would in some manner mark the land on the ground or describe it by natural objects or metes and bounds in order that intending settlers or claimants under other Acts would have notice of its location without in all cases having to employ a surveyor who at most would be able only to approximate the location of the selection and could in no case be certain of it. Again, as to the privilege of conforming the description to the survey in the new list required, and which the Department has held must be filed within the time limited to protect it from the acquisition of other and superior claims, what is its purpose? Did Congress use words to no purpose in requiring this new list conforming the description to the survey? Undoubtedly it did, if the description in terms of a future survey is sufficient, for *there can be no conformation, has never been in any case and never can be,* for the simple reason there *is no description whatever to conform.* The only description is that which the sur-

veyor may give when he makes the survey, and that is certainly the end of it so far as conformation is concerned. This alone is conclusive evidence of the fact that Congress intended a description in fact, which in many cases would require conformation.

The homestead settler on unsurveyed land must mark his claim on the ground, and when the land is surveyed he must adjust his claim to the lines of the survey. Likewise the mineral claimant must also mark his claim on the ground and post it. And since November 3, 1909, it must be done in all cases. All of this is to give notice to others of the exact location of their claims. Why should a different rule prevail under this Act which requires reasonable certainty of the location? The circulars relied upon are based upon other statutes containing different language and all entitled to a liberal construction, because in the interest of settlers. None of these statutes require the same particularity of description that is required in the one at bar. Counsel did not always consider the circular under the Act of June 4, 1897, as applicable to the Act of March 3, 1899. The latter is a special act and when the provision of the Act of June 4, 1897, permitting the selection of unsurveyed land was amended so as to confine it to surveyed lands, it was claimed by the company and held by the Department this amendment did not affect the rights of the company for that reason. (34 L. D., 88.) It was likewise so held when the Forest Lieu Act was repealed and the company was held to be unaffected by the repeal, and yet the Department, the Trial Court, the Circuit Court of Appeals and counsel hold and contend that the circular under the Act, as to sufficiency of description *is applicable* to protect its selection, though not so upon its face, and issued under a general statute while the one at bar is special.

But, even if applicable, the circular does not recognize descriptions of land in terms of future survey as sufficient, except in special cases, as stated therein, "if practicable." This probably means when tied to an established survey, and in all other cases a description in fact is required by this circular. Why the Department or the courts should sustain such a description the effect of which would be the defeat and denial of the rights of actual settlers without notice or knowledge of the claims of the company, which has no equities, by applying this circular under a general statute, we cannot understand.

X.

The learned Circuit Court of Appeals in attempting to show in this case how the land could have been readily located over a mountainous timbered country by measurements from the corner of Section 32 on the south line of the township immediately north, which had been surveyed, demonstrated conclusively that it could not be done with an approach to accuracy, for, if measurements had been made from this corner, it would have been nearly 17 rods from where the line of Section 20 closed on said south line of the township north. See diagram and copy of Twp. plat filed with our original brief.

We assert that no surveyor who ever lived could have, in advance of the issuing of instructions for the survey of the township, located with any degree of accuracy, any tract in it. We argued this question somewhat fully in our original brief and desire now only to invite attention to some decisions of the courts which are not referred to therein.

On the point of the impossibility of identifying land before surveys, the Supreme Court of Idaho, in the case of Rogers vs. Hawley (115 Pac., 687), in giving the

reasons for exchanging the 16th and 36th Section in a forest reserve for surveyed lands outside stated:

> "Under the rule adopted by the Supreme Court of the United States in U. S. vs. Montana Lumber and Mfg. Co., 196 U. S., 573, and followed by this court and other courts. Azcuenaga Bros. Live Stock & Land Company vs. Cortt (115 Pac., 18); Clemmons vs. Gillette, 33 Mon., 321; 83 Pac., 879, and U. S. vs. Burdeye, 137 Fed., 70; C. C. A., 100, there is no method whereby the State can identify an unsurveyed section of the public domain, and no evidence would be admissible to identify a school section until after the Government survey has been made. In the absence of any means of locating the section on the ground and identifying it, the State cannot lease the land to anyone and can consequently, realize no profit or income from any unsurveyed section."

The case of the U. S. vs. Montana Lumber Co., 196 U. S., 573, referred to by the Supreme Court of Idaho, supra, was an action in trespass against the Railway Company for cutting timber on the land prior to survey. The company claimed that by a private survey made by it, the land in question was shown to be an odd-numbered section which belonged to the company under its grant, and therefore it could not be liable for trespass in cutting timber on the land granted to it. This court Mr. Justice McKenna, speaking for the court said:

> "The survey of the land is left to the Government; in other words, the identification of the sections—whether odd or even, is reserved to the Government."

Again, he quoted approvingly from the decision in the case of Leavenworth L. & G. R. Co., 92 U. S., 733, as follows:

> "They (the words 'there be and is hereby granted') vests a present title, though a survey of the lands and location of the road are necessary to give precision to it, and attach it to any particular tract * * * until the identification of the even and odd-numbered sections the United States retained a special interest in the property at least, etc. * * * It was error, therefore, in the trial court to admit the survey made by Ashley."

As also bearing upon this point this court in the case of U. S. vs. Morrison (240 U. S., 192), involving the question whether prior to survey, Congress could make other disposition of the 16th and 36th sections theretofore granted to the State of Oregon, Mr. Justice Hughes speaking for the court among other things, said:

> "Prior to survey, the designated sections were undefined and the lands were unidentified."

After stating that the people were not interested in getting the identical 16th and 36th sections it was said:

> "Indeed, *it could not be known* until after a survey where they would fall."

Again—

> "Until the status of the lands was fixed by a survey, and *they were capable of identification*, Congress reserved absolute power over them * * * the State was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years and Congress was left free to legislate touching the national domain in any way it saw fit to promote the public interests."

As to when a survey is complete it was said:

> "It necessarily follows that the making of a survey and its approval by the Surveyor General of Oregon, did not make the survey complete as an official act. It still remained subject to the examination and approval of the Commissioner. * * * If title passes upon survey, it must be upon the survey duly completed according to the authorized regulations of the Department."

If, therefore, the State of Idaho, as held by her Supreme Court, and the State of Oregon as held by this court, with all their great power and resources, were unable to identify the 16th and 36th sections granted to them, how we may ask, is what the district court held to be the "land-hungry" homestead claimant, without means, perhaps, living in a tent and carrying his supplies sixty to seventy-five miles on his back, as was the case with most of the settlers in this vicinity, to identify the tract, the company has selected without furnishing him a more definite means of identification than Congress furnished these States in their grant?

These decisions also completely overthrow the doctrine that a tract might be identified if in the vicinity of a surveyed line, for section 36 is always the southeast corner of a township, which corner is the one from which, under the manual of surveying the survey is always commenced in the absence of special instructions to the contrary.

Instead of such a description being "reasonably certain" as required by the law, it is *most unreasonably uncertain.*

At page 44 of their brief counsel for appellees call attention to the fact that we attributed to this court certain language set out in the case of Central Pacific Rail-

road Company vs. Nevada, 162 U. S., 512, as language used by Mr. Justice Brown speaking for the court, when in fact it was the language of the Supreme Court of Nevada, quoted approvingly, as we understand it.

Admitting we accidentally attributed the language to this court, yet, the language actually used by Mr. Justice Brown is not only substantially the same, but is more pointed and more succinctly stated than that by the Supreme Court of Nevada. It is as follows:

> "While as above stated, it does not clearly appear from the opinion of the Supreme Court of Nevada in this particular case, what the distinction is as to a possessory claim between surveyed and unsurveyed lands, there is a clear distinction in the fact that, *until lands are surveyed, it is impracticable to identify them for the purposes of taxation.*"

If counsel can get any comfort out of this accidental error, they are certainly entitled to it.

Counsel, at page 38 of their brief, referring to our contention as to what would be a sufficient description under the terms of the Act, say:

> "The form of description which appellants argue for in these cases calls for *absolute certainty*. But the words of the Act are more elastic in their meaning and purpose."

On the contrary, we insist only upon such description as has been absolutely required of the company under this Act since November 3, 1909, and which the Department in the Daniels' case said should "always have been as it now is, required," and such only as the homestead settlers and the mineral claimant always have been required to give and which would constitute notice to other

intending claimants. Moreover, an "absolutely certain" description would not be such as is contemplated by the Act, for, in such case, there never could be any occasion for the conformation required by the law. It is just here the construction of counsel and the decisions favorable thereto, demonstrate their error. A mere statement of their construction, when compared with the terms of the Act, demonstrates the inherent vice of the proposition. The description in terms of a future survey is either "absolutely certain," or it is no description at all, and is absolutely void for any purpose. No one claims it is absolutely certain, and if it were so claimed, it would make vain and foolish both the requirement of a new list and the provision for conformation after survey. It is squarely in the face of the Act.

Necessarily, therefore, it is conceded by all of the advocates of its sufficiency it is not absolutely certain; in fact, it is not certain at all, but it is erroneously claimed it is capable of being made certain and defended for that reason. But if this were true, (and the decision appealed from demonstrates its fallacy), whose *duty* is it to make it certain. The company, or any and all persons desiring to initiate claims? Can a description be a compliance with the law requiring designation of land with a reasonable degree of certainty, which is admittedly uncertain, and the selector does not attempt to make it so, but leaves that to anyone who dares attempt to acquire title, the right to which is given him under the Act of 1880, to any tract in an unsurveyed township for fear of trespassing upon this admittedly uncertain description and losing his improvements and his time and labor after the survey of the land? It seems to us utterly unreasonable and untenable and therefore should not be sustained by the court.

In reference to the insistence by counsel that instructions applicable to the Act of July 1, 1898, and June 4, 1897, are broad enough to cover the description required in the Act of 1899, let us compare them and see to what extent, if any, the description required is the same, even though they were entitled to the same liberal construction as the Acts of 1897 and 1898 are.

The Act of July 1, 1898 (30 Stat. 620) provides in terms that "all selections of unsurveyed land shall be of odd-numbered sections to be identified by the survey when made."

The Act of June 4, 1897 (30 Stat., 36) provides that in cases where tracts are covered by an unperfected claim or a patent and it is included in a forest reservation he may relinquish and "may select in lieu thereof, a tract of vacant land open to settlement not exceeding in area the tract covered by his claim."

The Act of March 2, 1899 (30 Stat. 994) provides that the company may select "an equal quantity of non-mineral public lands so classified as non-mineral at the time of actual Government survey. * * *

In case the tract so selected shall, at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the tract shall have been surveyed and the plats filed in the local land office, a new list shall be filed; and in case such tract as originally selected and described in the list filed in the local office, shall not precisely conform with the line of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

It will thus be observed that neither the Act of 1897 nor of 1898 contains any provision whatever as to the description of the land. The Act of 1897 is silent and it was sometime after its passage before it was held that it embraced unsurveyed land, while the Act of 1898 is also silent upon the subject of description and there is nothing in the Act prescribing what shall be done by the company, and the only limitation that is placed upon it is that *it shall not be entitled to select any but odd-numbered sections.* It does not provide how the company shall designate or describe the land. The fact that the surveyor is required to identify the odd-numbered sections when he makes the survey adds nothing whatever to his duty under the law and his instructions, as he must designate every section and number it whether odd or even. This is true of all the 36 sections of a full township.

Not so in the Act of 1899. In the first place the company must describe the land when it makes the selection "with a reasonable degree of certainty."

2nd. A new list must be filed in 90 days after the plats of survey are filed in the local office describing it according to the survey.

3rd. If the tracts in the original list do not precisely conform to the lines of survey the company is permitted to describe such tract anew so as to secure such conformity.

This latter provision can have no meaning whatever if a selection in terms of a future survey only is used. There could be no lack of conformity when there was no original description except that which the surveyor would give it, and when he does so, then to say that precisely the same description under any possible circum-

stances would lack conformation with the same number and description seems to us so utterly untenable that we are surprised it should be insisted upon.

Counsel for appellees in their brief at page 34, referring to this form of description say:

> "Speaking generally, it is, perhaps, the very best method of designating or describing unsurveyed lands that could be devised."

The Department, although sustaining such description in the Daniels' case, supra, not because it was the "very best method of designating or describing land," but because it was in the "vicinity" of established lines of survey and might for that reason be made certain and for the further reason that it had been permitted theretofore, denounced this favorite method of counsel, in the following language:

> "While the metes and bounds description of selected unsurveyed land should always have been, as it now is, required, etc."

In the Hanson case, supra, the Department said:

> "At the time this motion was entertained, this Department had grave doubts as to the sufficiency of such description as against the claim of settlers subsequently initiated, and there was under contemplation the formation of regulations which would give ***more precision*** to such selections and afford ***settlers*** greater security in the matter of ***initiation*** of claims for such lands."

In the Hyde case, supra, it was said:

> "An application to make forest lieu selection of unsurveyed lands not identified with reference to natural boundaries or monuments or

such markings on the ground as would constitute notice to intending settlers, is no bar to the attachment of rights under the Act of May 14, 1880."

In that case it is further said:

> "He might have selected surveyed public lands of the United States, vacant and open to settlement, and upon proof of their non-mineral character and non-occupancy concurrent in time with the selection, he might have completed title thereto without delay; but if he selects unsurveyed lands *it is a matter of his own choice and made at his own risk.*"

The same is true in the case at bar. The company was not bound to select unsurveyed lands but did so as a matter of choice, and if not so described as to give notice to others intending to initiate claims to the same lands, it must take the risk of the initiation of valid claims by settlers who had the right under the Act of 1880 to make settlement of unsurveyed lands. They were required however, to so designate the land settled upon by marking on the ground, blazing the trees, or notices posted so as to give notice to everyone of the exact location of their claims.

We are sorry counsel felt it incumbent upon them, as we must assume, for the purpose of influencing this court, to print as an appendix to their brief, the Departmental decision in the case of Kip Calkins Miles, et al, vs. N. P. Ry. Co., rendered February 16, 1915. We referred to this decision in our original brief and are indebted to counsel for having it printed in full, as it shows clearly that in the motion for rehearing upon which this decision was rendered it was asked that "the facts as to the mineral classification of the lands, the lack of prox-

imity of established Government surveys, as well as the other facts as fully shown in the hearing in the Miles' case, be set out in any decision made."

This case in which a hearing had been had against the company's selection was argued orally in the Department. The Daniels case an application to make homestead entry, which was never mentioned in argument, was taken up and made the leading case and the Miles and other cases embraced in the petition for supervisory authority ruled by it. The only apparent reason for this action lies in the fact that the land in the Daniels case was within three-quarters of a mile of the surveyed western boundary of the township, while in the Miles case the land was 12 miles from a surveyed line from which measurements could have been made; and as the Department had held in the Daniels case the "vicinity" of an established line of survey made a description in terms of a future survey reasonably certain, we asked that the Miles case be distinguished from it for this reason. Moreover, the question of the sufficiency of the description in terms of future survey was not raised in the Daniels case as it was in the Miles case. Daniels' application to enter was rejected for conflict with the selection of the company, whereupon he filed an application to contest, alleging as set out by the Department at page 382 of the decision, "that the selection was illegal and void, inasmuch as the company had *wholly failed to post notice on the land.* And that he had no notice actual or constructive of the selection at the date of his settlement.

In the motion for rehearing in the Miles' case we filed a letter from the Commissioner as to the survey and made it part of our brief. In that letter among other things the Commissioner said:

"As to what difficulty, if any, a reasonably competent surveyor would have had in locating on June 21, 1901, with reasonable certainty, what would be technical legal subdivisions in Tp. 43 N. R. 3 East and Twp. 44 N., Rgs. 2 and 3 East, it will be observed that the 9th Standard Parallel, the south boundary of Tps. 45 N. Rgs. 1, 2 and 3 East, had been established in 1897; the south boundary of T. 43 N. R. 2 East in 1899, and the east boundaries of Twps. 43 and 44 N. R. 1 East in 1891 and 1900.

It is therefore apparent that a very considerable amount of preliminary work would have been necessary to define, with reasonable certainty, what would be technical legal subdivisions in T. 44 N. Rgs. 2 and 3 E., and T. 43 N. R. 3 East, especially in T. 44 N. R. 2 E., where the nearest established corners were the southeast corner of T. 43 N. R. 2 East, and the SE corner of T. 44 N., R. 1 E., from which former corner lines approximately twelve miles in length had to properly coordinate before any subdivisions in T. 44, N. R. 2 East could be determined, presuming the subdivisional lines were to be run, as they were ultimately run in 1904, from the south and east to the north and west, and the same observations apply to the subdivisions in Twp. 43 and 44 N. R. 3 East, by reason of the fact that the southeast corner of T. 43 N. R. 2 East was the only corner from which technical subdivisions could be located and then only after the exterior lines of the two townships had been established and co-ordinated."

It is seen the Department not only ignored the information from the records of the survey stated in the letter of the Commissioner, but declined to state the facts as therein contained and evaded what seems to us to have been clearly the duty of the Department, especially since the courts hold the finding of facts to be conclusive. Of course a statement of the facts would have shown

clearly the case did not fall within the rule laid down either in the Daniels' case, that of Judge Dietrich in this case, or by the Circuit Court of Appeals and the Department would necessarily have had to reverse its decision or else grant the motion for rehearing and decide the case against the company. The same is true as to the classification. There is a clear failure to state the facts. Are we wrong, therefore, in saying the Department has not been quite fair to the settlers in these cases against the company?

Again, counsel refers at page 13, of their brief, to the case of Delany vs. The N. P. Ry. Co., 45 L. D., 6, as showing the intolerable consequences which would result if the rule for which we argued as to the lack of a grantee were adopted. This is a most remarkable wail coming from a private corporation which claims the right to select as the successor of another company to which the privilege was granted, nearly a half million acres of the most valuable public lands in the eight principal public land States, in lieu of worthless mountain ranges of scarely any value. The company has no equities whatever. Moreover, if the grant fails, or if the Railway Company has no right to make selection, or the selection fails for any other reason, the scrip will be returned and is much more valuable than it was when located. And, if Congress intended to grant to be to the Railway Company, the previous success of that company in getting all it is equitably entitled to enables us to assume it will get it in such case.

This court did not hesitate to hold the Department was in error in construing the grant to the Railroad Company as having its eastern terminus at Ashland, instead of at Superior, as had been held by the Department, and large bodies of land patented to settlers and

the consequences seemed much greater than in this case. See U. S. vs. N. P. R. Co., 177 U. S., 435. "There can be no intent of a statute not expressed in its words." Lewis Sutherland on Statutory Construction, 2nd Ed., Sec. 388.

> "The intent of the law must first be sought in the language of the statute itself." Ibid Sec. 366.

In U. S. vs. Graham, 110 U. S. 219, this Court said:

> "When the language of an Act is so clear and explicit as not to be open to constriction, its construction cannot be changed by the practice of the Departments however long continued."

In Sh. P. M. & M. Ry. Co. v. Phelps, 137 U. S. 528, this Court, Mr. Justice Lanear delivering the opinion, said: (syllabus):

> "Where a statute is clear and far from all ambiguity, the letter of it is not to be disregarded in favor of a mere presumption as to what is the policy of the government, even though it may be the settled practice of the department."

The rule is thus stated in A. & Eng. Enc. of Law, Vol. 23, at page 299:

> "The duty of the Courts is not to make the law reasonable, but to expound it as it stands according to the real sense of the words used."

Again at page 302 of the same volume it is said:

> "The question is, not what the legislature meant, but what it said."

A word now as to the facts in the Delany case: This case is now in the United States District Court in Idaho in an action brought by Delany to require the company

to hold the title obtained in that case in trust for him. The State applied for survey under act of 1894 and within the time provided after survey, filed its selection of the tract. After date of the State's application the company also selected it under the Act of 1899. Delany settled under the Homestead Law after the State's application and after the selection of the company. When the State selected the land within the time allowed under the statute, it was clearly the duty of the Land Department to cancel and reject the company's selection. Letts vs. N. P. Ry. Co., 37 L. D., 37. It was not done, however, and after a twelve year's fight against the State its selection was cancelled June 28, 1915, in favor of Delany. At this juncture we have the remarkable spectacle of the Department invoking some ancient decisions under the contest law, under which a second or subsequent contest application might be held to await the action on the first, and holding them, like the circular under the Act of June 4, 1897, as applicable, thus keeping its selection alive while Delany made the fight against the State and thereby defeating his claim and patenting the land to the company. It strikes us no greater injustice under, what this court so plainly stated, in the case of Daniels vs. Wagner, 237 U. S., 547, as the claimed "unlimited, undefined discretion of the Department," could be done a citizen than has been done in this case in depriving Delany of the rights to which he was entitled and would have been accorded, but for this assumed discretion in applying the doctrine held under an entirely different statute. It was not done under any circular, neither was any precedent under a similar statute found that would enable the Department to keep alive the selection of the Company which should have been cancelled when the State's selection was allowed, and if not then, certainly when the Hyde case was

decided. But, without any notice to Delany, this old selection was permitted to lie dormant during all the years of his struggle as a settler on the land and his fight with the State until he succeeded in defeating the State when the company's selection turns up. Oh, what a terrible calamity it would be to hold the settler in such case had rights superior to those of the company! How unfair and unjust it would be. Again we ask, are we justified in our statement that the Department has been hardly fair in its treatment of the settlers in their conflict with the company?

But, counsel in this case, seek to throw the blame for any loss sustained, upon West, for not making inquiry as to other claims, especially that of the company. At page 59 of their brief they say:

> "No one was misled or prejudiced by the fact that the Railway Company pursued the approved practice instead of adopting a different method * * *. And it cannot be pretended that appellant's position would be any different or better if the Department had construed the act differently and had required a different course of procedure. Certainly he would not have been benefited if the selection list had described the land by metes and bounds or in some other manner, since his evidence is to the effect that he made no inquiry at or examination of the records of the local office and was unaware that any selection list had been filed."

We have carefully examined the evidence in the record and fail to find a single statement of West to this effect. He bought the improvements of Hanson who showed him the blazed lines around the land with notices of his claim posted thereon, dated May, 1902.

John Devegio (Tr., page 32), testified:

> "I made inquiry of the receiver of the land office here if there was anything against the land up in Marble Creek and I gave him the best description I could and asked him if any claims were being made to that land, and he looked at the record and told me there was nothing on record and said: 'The land is unsurveyed and subject to squatter's right. *The Government will protect you until it is surveyed.*'"

Newton J. Glover, another witness for West, testified (Tr., 38 and 39):

> "I never heard the Railway Company claimed this land prior to 1905; I went to the land office in July, 1901, and made inquiry as to this land; there was nothing in the record about it; it was open for homestead settlement."

It may be remarked in this connection that if the company had given such a description as has been required since November 3, 1909, in the general circular applying to all classes of claims to unsurveyed land, which the Department held should have been always required, there would have been a metes and bounds description with a *notice posted on the land* and an approximate section town and range description also; or even that of December 18, 1899, under the Act of June 4, 1897, (29 L. D., 391), requiring notice of the selection of unsurveyed land to be posted on the land and in the local office it would have been identified on the ground. If this had been done, as in our judgment the statute clearly requires, the appellant certainly would not have undertaken to make settlement on the land and would have saved the outlay of $2,800 expended on the land and

fourteen years of residence. It comes with bad grace from the company to insist that a description which the Supreme Court of Idaho has held, and as we have seen this court has held in more than one case, is so indefinite that the State could not identify the land granted to it by such description and the company could not by a private survey even, so designate the odd numbered sections as to prevent an action for trespass for cutting timber upon the land which their survey demonstrated was an odd numbered section and was the property of the company, was, nevertheless, sufficiently definite to give notice to all intending homestead settlers. It seems to us nothing could be more illogical and unreasonable than such contention.

Counsel at page 28 of their brief assert. that neither the question of classification under the Act of 1895 or by the surveyor at the time of survey, nor the so-called successorship are before the court as no such questions are in issue under the pleadings.

It is a little late to make this suggestion after these questions were all considered by the District Court without objection on the part of appellees except, possibly, classification under Act of 1895, and were properly reserved in the assignment of errors in the Court of Appeals and in this Court.

In Paragraph 12 of the complaint (Tr., pp. 5 and 6) after setting out the acts of West under his homestead claim, it is stated that the appellant "was and at all times since has been and now is, the owner and lawfully entitled to the patent for and a legal title to said premises."

In Paragraph 13 it is alleged that the acts of the defendants concerning the selection and the acts and proceedings of the Commissioner and Secretary in connection therewith, and in the issuance of patent are and were contrary to and without authority of law, and in

violation of the rights of the plaintiff, and that at date of initiation of the railway claims it was wholly without authority of law to select or claim the said lands, and that the Act of Congress of March 2, 1899, under which the company based its rights, is unconstitutional and void and confers no right whatever upon defendants to select the land. The Railway Company, in Paragraph 8, of their answer, alleged that the land at the time of selection was unsurveyed public land of the United States, non-mineral in character, not reserved and to which no adverse right or claim has attached or been initiated; that said land was so classified as non-mineral at the time of actual Government survey; that on said 21st day of June, 1901, this defendant duly made selection of said land under the provisions of the Act of Congress approved March 2, 1899; * * * that said selection was duly made by filing in the said United States Land Office at Coeur d'Alene, Idaho, a proper selection list or application to select which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules, regulations and practice established and approved by the Secretary of the Interior.

The appellant, plaintiff below, in his reply to the answer stated:

> "That his bill is true and sufficient as averred, and that he is ready to prove it, and that the answer of the defendant is untrue and insufficient."

It seems to us clear these pleadings sufficiently raise the issues of the right of the Railway Company to make the selection, whether the acts alleged to have been performed by it are legal and a compliance with the law, as well as the *character* of the land as prescribed by the Act. The square denial of the plaintiff put them in issue.

CONCLUSION.

In conclusion we submit that, under the construction of the Act of March 2, 1899, contended for by counsel for appellees, the Act of May 14, 1880, authorizing the initiation of homestead claims by settlement, is practically repealed by the Act of May, 1899. For, if the company can select unsurveyed lands without any notice other than that in terms of a future survey, which land can be identified only when surveyed, as held by this court, then settlers must do so at their peril and in the language of Secretary Adams quoted from in our original brief."

> "After he has gone upon the public domain in pursuance of such lawful design and marked his claim and perhaps cultivated and improved it, may be awakened years thereafter to find that it is lost to him by reason of a prior appropriation of which he had no notice either in law or in fact. The proposition, therefore, seems to lead to a preposterous result and in my opinion cannot be entertained."

Whatever may be said, this is clearly the practical effect. Did Congress intend this result? Will anyone insist it was its purpose to put actual settlers it had invited to make their homes on the public lands in such a precarious condition, in the interest of a private corporation? We apprehend not.

In K. P. R. Co. vs. Prescott, 83 U. S., 603, this court speaking through Mr. Justice Miller referring to such settlers said:

> "The policy of the Government has been for years to encourage settlement on the public land by the pioneers of emigration, and to this end it

has passed many laws for their benefit. This policy not only favors the actual settler, but it is to the interest of those who, by purchase, own adjacent lands, that all of it should be open to settlement and cultivation."

In the case of N. P. Ry. Co. vs. Amacker, 175 U. S., 564, this court speaking through Mr. Justice Brewer said:

> "The contest in this case is between one claiming under a homestead entry and the company claiming under a grant in aid of the railroad. It was long ago said by this court that the policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements over that of any other person. * * * It is not, therefore, strange that the rulings of the Land Department, as well as of the courts, have been uniformly favorable to the individual contesting with a railroad company the right to a particular tract of land."

In the case of Ard vs. Brandon, 156 U. S., 537, Mr. Justice Brewer, again speaking for this court said:

> "The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone up the question whether or not he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application."
>
> "The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the

purchasers of a limited extent of land, comprehending their improvements over that of any other person. Clements vs. Warner, 65 U. S., 394."

In view of this universally held doctrine we again ask whether it be possible Congress intended by the enactment of the law of March 2, 1899, to practically defeat the rights of settlers upon unsurveyed lands in eight of the public land States including nearly all of the northwest? No one disputes the proposition that where there are no visible marks on the ground anyone who settles must take the risk of being on land selected by this company of which he has no notice and can have no actual knowledge. We do not believe this court will sustain such a position.

Because of the fact that this scrip may be located any place in the States through or into which the road runs, it is not possible, as it was before that Act, to know with certainty the location of any lands to which a claim by the Railroad Company can be lawfully asserted. It is a possible claimant for any land situated anywhere in any of these eight great public land States in the northwest. When Congress chartered the Northern Pacific Railroad Company (Act of 1864), and granted to it an empire of public lands, it was as a *transportation* company, which was then the crying need of the country. But under this Act and that of 1898, it has gone into the scrip business on a gigantic scale, and with the single exception of soldiers additional, was made the owner of the largest body of scrip ever issued by the Government. With this scrip it can take the even numbered sections in its grant and thereby become the owner, contrary to the entire policy as to railroad land grants, of solid bodies of the finest timber and other lands on the pub-

lic domain. And yet, it asks for a liberal construction of the Act and its counsel put up a pathetic wail over the great hardship that will result to it by holding it did not give settlers sufficient notice of its claim to unsurveyed lands, and they were, therefore, misled into the expenditure of thousands of dollars in improvements and, in this case 14 years of residence.

Respectfully submitted,

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Washington, D. C.
April, 1917.

SUBJECT INDEX

Page

STATEMENT 1-2-3

ARGUMENT:—

Three principal questions are presented by the record:

1. The grant by the Act of March 2, 1899 having been made to the Northern Pacific *Railroad* Company, a great corporation created by Act of Congress and to which the Government had theretofore granted approximately forty-three million acres of land a part of which it was authorized to reconvey, could a selection be made by the Northern Pacific *Railway* Company, a separate and distinct corporation under a State charter granted by the State of Wisconsin, upon the sole ground that because of its purchase of the property and franchises of the Railroad Company under forclosure sale, it was its successor in interest? And the Railroad Company having no existence at date of the Act was there any grantee in existence to take the grant? 10

2. The lands having been classified as mineral under the Act of March 26, 1895, which classification was approved by the Secretary of the Interior March 26, 1901, a date prior to the selection by the Company, and the surveyor having failed to make any classification in terms as non-mineral, was the land subject to selection by the Company under the Act of March 2, 1899?..... 10

3. If the Railway Company was authorized to make the selection, and if the land was subject to the selection at the date it was made, was the description given of the land selected in terms of a future survey, a compliance with the requirement of the statute that it should be designated with "a reasonable degree of certainty," so as to bar the rights of settlers in good faith without actual or constructive notice? ----------

APPENDIX "A" ---------- 73

Statutes, Regulations and Authorities Cited.

Act February 11, 1805 ---------- 35
Act March 2, 1899 ---------- 2
Act March 2, 1897 ---------- 7
Act March 26, 1895 ---------- 15
Act March 2, 1864 ---------- 13
Act March 2, 1899, Sec. 4 ---------- 12
Act July 1, 1898 ---------- 67
Act Aug. 5, 1892 ---------- 52
Act July 2, 1864 ---------- 17
Am. & Eng. Enc. of Law, Vol. 23, p. 407 ---------- 8
Attorney General Harmon (21 Ops. 486) ---------- 16
Allen v. Louisana 103 U. S. 84 ---------- 24
Attys. Gen. 21 Ops. 486—25 Ops. 401 ---------- 16

Barden v. N. P. RR. 154 U. S. 312 ---------- 9
Board Education v. Crawford 790 (14 West Va.790) 40
Bird Timber Co. v. Snohomish et al. (143 Pac. 433) 43

Circular June 25, 1895, 20 L. D. 571 ---------- 25
Circular Nov. 3, 1909, 38 L. D. 491 ---------- 47

Circular Instructions Secty Pierce, July 26, 1910, (39 L. D. 116) ---------- 27
Circular Instructions, April 13, 1895 ---------- 28
Circular Nov. 3, 1909, 38 L. D. 287 ---------- 38
Circular Feb. 14, 1899 (28 L. D. 103) ---------- 54
Circular June 4, 1897 (28 L. D. 521) ---------- 48
Circular Dec. 18, 1899 (29 L. D. 391) ---------- 63
Circular May 9, 1899 (29 L. D. 521) ---------- 61
Circular May 30, 1897 (24 L. D. 589) ---------- 63
Circular Feb. 19, 1902, (31 L. D. 251) ---------- 50
Coal C. v. U. S. 123 U. S. 327 ---------- 31
Coleman v. McKenzie, 228 L. D. 348 ---------- 31
Cyc. Vol. 9, pp. 265-276 ---------- 5
Cyc. Vol. 3, p. 852 ---------- 6
Carr v. Duval et al. (14 Pet. 77) ---------- 6
Comstolk v. N. P. Ry. Co., 34 L. D. 88 ---------- 7
Charles River Bridge v. Warren Bridge, 11 Pet 420 9
C. & O. R. Co. v. Miller, 114 U. S. 176 ---------- 20
Central Pac. RR. Co. v. Nevada, 162 U. S. 512 ------ 42
Cornell v. Coyne 192 U. S. 432 ---------- 9
Central Pac. RR. Co. v. Nevada 162 U. S. 512 ---- 42

Decision—20 L. D. 350 ---------- 54
Decision—81 Wash. 416, 143 Pac. 433 ---------- 43
Decision Circuit Ct. Appeals ---------- 59
Deffenback v. Hawk 115 U. S. 404 ---------- 31
Davenport v. Lamb 13 Wall 418 ---------- 20
Dubuque & Pac. RR. Co. v. Litchfield 64 U. S. 166 -- 9
Daniels v. N. P. Ry. Co., 43rd L. D. 287 ---------- 46

Eleason v. Henshaw, 4 Wheat 228 ---------- 6

F. A. Hyde et al. 40 L. D. 284 ---------- 34

First Asst. Secty Jones 42 L. D. 259 ---------- 36

Gorman v. Stead First West Va. 14 ---------- 40

Humbird v. Avery 195 U. S. 480 21
Heath v. N. P. Ry. Co. 38 L. D. 77 21
Hall v. Russell 101 U. S. 509 20
Howard v. C. & O. Co. RR. Co. 122 U. S. 222 20
Hanson v. N. P. Ry. Co. 38 L. D. 491 45
Hannibal & St. Joseph Ry. Co. v. Mo. River Packet Co. 125 U. S. 260 9

Idaho v. N. P. Ry. Co. 42 L. D. 118 8
Ill. Central Ry. Co. v. Ill. 146 U. S. 468 24

Julian v. Central Trust Co. 193 U. S. 93 20

Kean v. Calumet Canal Co. 190 U. S. 488 24

Lamb et al. v. N. P. Ry. Co. 29 L. D. 102 26
Letter First Asst. Secretary Adams 56

Mining Co. v. Consd. Mfg. Co. 102 U. S. 167 31
Minn. & St. L. Ry. Co. v. Columbus Rolling Mill Co. 119 U. S. 149 6
M. K. & T. Ry. Co. v. K. P. Ry. Co. 90 U. S. 491 24
Memphis & Little Rock RR. Co. v. RR. Commissioners, 112 U. S. 619 20

Northern Pac. RR. Co. 40 L. D. 441 7
Newton v. Commissioners 160 U. S. 548 10
Northwestern Fertilizing Co. v. Hyde Park 97 U. S. 659 10
N. P. Ry. Co. 40 L. D. 64 31
N. P. R. Co. et al. v. U. S. 176 Fed. Rep. 706 31
N. P. Ry. Co. v. Pyle 31 L. D. 396 53
N. P. Ry. Co. v. Amacker 175 U. S. 564 55

Ops. Attorneys General 21 Ops. 486, 25 Ops. 401 16
Oregon etc. R. Co. U. S. 539 and Oregon N. & N Co. v. Oregonion R. Co. 130 U. S. 1 24

Pacific v. Chicago & St. L. R. Co., U. S. 7, Ct. Appls. 20
Poe. v. Wayman 256 Ill. 151 (99 NE 941) 19
Pawlett v. Clark 9 Cranch 331 20
Platt v. U. P. Ry. Co. 99 U. S. 58 24
Pacific v. Chicago & St. L. R. Co., U. S. 7, Ct. of Appls., Jan. 20, 1892 and 15 L. R. A. 82 20

Raleigh & G. R. Co. 13 Wall. 269 12
Reynolds v. Condge, 11 P. A. Co. Ct. Rep. 306 20
Rector v. Ashley, 73 U. S. 11

Shields v. Ohio 95 U. S. 319 20
Sellers v. Union Lumber Co. 39 Wis. 525 Cyc. Vol. 19, p. 1460 20
State Tonnage Tax Case 13 Wall 217 26
State of Idaho v. N. P. Ry. Co. 37 L. D. 135 3
Slidell v. Emler 111 U. S. 412 9
Stevens v. Smith, 10 Wall. 321 12
Senator Hoke Smith, Apr. 13, 1895 (20 L. D. 350) 54

Tucker v. Ferguson, 89 U. S. 22 10
Thorne v. Lazarus, Vol. 39, p. 508 40

U. S. v. Orredondo, 6 Pet. 739 24
U. S. v. Michigan 190 U. S. 401 24
U. S. v. Burr 159 U. S. 82 4
U. S. v. Montana Lumber Co. 196 U. S. 573 64

Van Deventer, W. J. Opinion (28 L. D. 312) 58
Van Dyke v. New York State Banking Co. 18 Misc. 40

White v. U. S. 191 U. S. 551 24
Wis. Central R. Co. v. U. S. 164 U. S. 190 7
Wiggins Ferry Co. v. East St. Louis 107 U. S. 371 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

ANDREW WEST, *Appellant*,

v.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY CO. } No. 695.

APPEAL FROM CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT.

This is a suit by Andrew West in the District Court of the United States for the District of Idaho, Northern Division, to have the defendant and Edward Rutledge Timber Company declared a trustee of the title to the Southeast quarter of Section 20, Twp. 44, N. Range 3 East, Boise Meridian, Idaho, for his use.

The plaintiff bases his claim upon his settlement before survey, followed by his residence, and cultivation in compliance with the homestead law.

The Railway company claiming to be the successor of the Railroad company filed its list of selections No. 61, in the proper local land office June 21, 1901, under the provisions of the Act of March 2, 1899, designating it as the *"land which when surveyed will be described"* as above. Later, to-wit, on July 31, 1905, the company filed its new selection list describing the land by its legal subdivisions as surveyed. The plat of survey was filed in the local office July 17, 1905, and patent issued to the Railway company October 13, 1910.

The timber company is the successor of the Railway Company. When the selection list was filed the nearest surveyed line, as found by the Court was the township next north of the one in controversy.

West settled May 15, 1903, having bought the improvements of John Hanson, a previous settler and continued to comply with the homestead law, and on July 17, 1905, filed in the local office an application to make entry, which was rejected for conflict with the selection of the Railway company which action was subsequently affirmed by the Commissioner and later by the Secretary of the Interior.

Both defendants set up title acquired by the patent issued to the Railway Company and the conveyance by it to the Timber Company.

The District Court held West was a qualified homesteader and proved sufficient compliance with the law to entitle him to patent, but that the railway company had acquired a prior and superior right under its selection.

Upon appeal this decision was affirmed by the Circuit Court of Appeals for the Ninth Circuit. West appealed to this Court and his assignment of errors brings the whole record before the Court for consideration and decision.

ARGUMENT.

History of the Act, the Class to Which it Belongs and Its Proper Construction.

I

The Interior Department in stating the history of the Act said:

> "It was deemed necessary to the accomplishment of its purpose that the United States should own the land placed in reservation by the Act. A voluntary conveyance by the Railway company was the most feasible method of reacquiring title to the land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The Act is contractual in character and terms and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer." (State of Idaho v. N. P. Ry. Co. 37 L. D. 135).

The Trial Court in the decision in this case put the matter as follows:

> "The grant was in no sense a gratuity. The Government contemplated the creation of the Mount Ranier National Park, and to carry out the

purpose it was deemed desirable, if not absolutely necessary to procure title to certain lands embraced in the land grant made to the Railroad Company by the Act of July 2, 1864. For these it was willing to exchange other lands, which it owned, and by the Act it proposed to make such exchange."

This view urged to show the intention of the Government, and its needs, and hence to give the Act a more liberal construction, is not borne out by the records of Congress. No Department nor other Executive officer *initiated* nor so far as we have been able to ascertain, after diligent investigation, even *approved*, the creation of this Park and the passage of this Act. On the contrary, the bills were introduced in the 54th Congress in the Senate by Senator Wilson, and in the House by Mr. Lewis, both of the State of Washington, who were understood to be friendly to the Railroad Company. The bill was passed, *signed by the Speaker March* 3, 1897, *but was not approved by the president.*

Copies of these bills were introduced in the succeeding Congress, again passed, and approved March 2, 1899.

It is well known that where such legislation involving the creation of parks or other public reservations is desired by the Government, a request or recommendation is always made by the Forest Service or the Interior Department, or at least a recommendation or approval of bills introduced in Congress. The courts have a right to consider the history of steps taken in enactment of the law. U. S. v. Burr N. 159 U. S. 85.

THE CLASS OR CLASSES TO WHICH THE ACT BELONGS AND ITS PROPER CONSTRUCTION.

As we have seen, both the Interior Department and the Trial Court held the Act is contractual and is an option given the company to convey lands acquired as part of its grant and to permit it to select other non-mineral public lands, surveyed or unsurveyed, not within the limits of its grant only, nor even of the State, but within any State through or into which its road runs which, includes the States of Michigan, Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington and Oregon. The company was limited to a certain class of lands to be "classified" in a certain manner by a specified officer and when the land was unsurveyed it was required to be described in a special manner, and the company was required to file a new list after survey. If this view of the class to which the Act belongs is correct, it is strictly an option and must be accepted if at all in the precise terms of the offer, which terms and conditions must be strictly complied with, and hence the Act must have a strict construction and the company must have brought itself within the precise terms and conditions written into the statute by its friends, if not by its officers or attorneys, to sustain its selection thereunder.

The true rule in such cases is thus stated in Cyclopedia of Law and Procedure, Vol. 9, pp. 265 and 276:

> "The offerer has a right to prescribe in his offer any condition as to time, place, quantity, mode of acceptance or other matters which it may please him to insert and make a part thereof and the acceptance to conclude the agreement

> must in every respect meet and correspond with the offer neither falling within or going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand.
>
> An acceptance, to be effectual, must be identical with the offer and unconditional." see also Vol. 3, p. 852.

In the case of Carr v. Duval, et al., 14 Pet. 77, the Supreme Court quoting Eleason v. Henshaw, 4 Wheat 228 held:

> "An offer of a bargain by one person to another imposes no obligations upon the former, unless it is accepted by the latter, according to the terms under which the offer is made."

In the case of Minn. and St. L. Ry. Co., v. Columbus Rolling Mill Company, 119 U. S. 149, it was held:

> "A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer and puts an end to the negotiation."

III.

THE ACT OF MARCH 2, 1899, IS A SPECIAL ACT AND REQUIRES STRICT CONSTRUCTION.

In the case of the Northern Pac. Railway Co., 40 L. D. 441, in which case the company was seeking to obtain the right to select lieu lands for the glaciers in the Mt. Ranier park, under this Act, it was held:

> "The Department is convinced that it was not the intention of Congress that such areas should be surveyed or disposed of as a part of the public land of the United States, and that the grant to the Northern Pacific Railway Company did not convey the same. If there be any doubt in the construction of the granting act in this respect, it must be resolved against the railroad company under the settled rule that such statutes are to be strictly constructed against the grantee, Wis. Central Railroad Co. v. U. S. 164 U. S. 190."

In the case of Comstolk v. N. P. Ry. Co. 34 L. D. 88, The Department held that the Act of March 2, 1899, is a *special statute* and therefore the amendment to the Forest Lieu Act of March 2, 1897, dated June 6, 1900, limiting selections under that Act to surveyed land, did not affect the right of the company to select unsurveyed land for the reason that *it is a special Act*, while the Act of March 2, 1897, is a general statute; likewise, when the Act of 1897 was repealed it was held that because the Act of March 2, 1899, is a *special statute* it was not affected by the repeal of the Forest Lieu Act.

In the case of Idaho v. Northern Pac. Ry. Co., 42 L. D. 118, the Department having under consideration the Act of August 18, 1894, authorizing the State to make application for survey with a view to selection of the lands in lieu of losses, held:

> "This was a statute granting a special privilege as against others seeking to appropriate public lands. It was held by Judge (now Justice) Lurton, in Campbellsville Lumber Company v. Hubberd 112 Fed. 718, concurred in by Judge (now Jutice) Day, that: 'An attentive consideration of the principle of statutory construction here involved leads us to conclude that when a statute gives a new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the Act should be strictly construed; and the validity of all acts done under authority of such an act will depend upon a compliance with its terms. In respect to such acts the steps pointed out for the acquisition, preservation and enforcement of the remedies provided should be construed as mandatory, rather than optional.' "

The Court cited Sutherland on Statutory Construction Sections 454 and 458 which were set out by the Depart-

The American and English Encyclopedia of Law Vol. 23, p. 407, states the rule as follows:

> "Acts conferring special privileges upon or granting public property to private individuals or corporations are construed strictly against the grantees and in favor of the State."

Again at page 402 of the same volume it is said:

> "When a statute gives right or remedy which did not exist at common law, and provides a specific method of enforcing it the mode of procedure provided by the statute must be pursued strictly."

In the case of Slidell v. Emler, 111 U. S. 412, the Court said:

> "Where a statute operates as a grant of public property to an individual, or the relinguishment of the public interests, that construction should be adopted which will support the claim of the Government rather than that of the individual."

In discussing this rule of construction the U. S. Supreme Court in the case of Dubuque and Pacific RR. Co. v. Litchfield, 64 U. S. (23 How.) 166, said:

> "The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear, to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms." Charles River Bridge v. Warren Bridge 11. Pet. 420; Barden v. N. P. RR. 154 U. S. 312; Cornell v. Coyne 192 U. S. 432; and Hannibal & St. Joseph Ry. Co. v. Mo. River Packet Co. 125 U. S. 260.

It may well be said, as was stated by counsel in the very able brief filed by them in the Circuit Court of Appeals, that in "their opinion the hand of the Rail-

road Company is seen in the drafting of the bill which became the law of March 2, 1899, for the reason that while the Railroad Company is given the right to select from the surveyed and *unsurveyed* public lands of the United States, the settler upon the lands sought to be set aside as the Mt. Ranier National Park is granted in lieu of his right, the right to select *only* surveyed lands. The Act in question to this very material extent prefers the railroad company over the settler. Under these conditions and circumstances it is not believed that the aid and encouragement of the courts ought to be given in further extending these rights of preference by construction of the Act in question in favor of the grantee who has thus sought and obtained an advantage over the settler who surrenders equal rights to such grantee."

In the case of Newton v. Commissioners, 160 U. S. 548 it was said:

> "The rule of interpretation in cases like this, as against the State, is, that nothing is to be taken as conceded but what is given in express and explicit terms or by an implication equally clear. Silence is negation and doubt is fatal to the claimant."

The Court in that case quoted approvingly the doctrine announced in the case of Tucker v. Ferguson 89 U. S. 22.

In the case of the Northwestern Fertilizing Company v. Hyde Park, 97 U. S. 659, the Court said:

> "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative

> must be shown. Silence is negation, and doubt is fatal to the claimant. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this country."

Notwithstanding these well settled rules of construction applicable to the grant in this case, every decision, circular, or practice cited either by the Department, the trial court, or the Circuit Court of Appeals is based upon statutes of a remedial nature requiring liberal construction.

IV.

TERMS OF THE ACT OF MARCH 2, 1899.

Having considered the history of the Act, its character as an optional contract as well as a special statute granting to the company the public property of the United States, we will now consider the exact terms and conditions under which the company could acquire title, for, as held by this court, in Rector v. Ashley 73 U. S.

> "The rights of a claimant are to be measured by the Acts of Congress, and not by what he may or may not be able to do; and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by statute, they must be governed by their provisions whether they be hard or lenient."

See also Raleigh & G. R. Co. 13 Wall 269 and Stevens v. Smith 10 Wall, 321, to the same effect.

The Act of March 2, 1899 (30 Stat. 990) is an Act to set aside certain public lands to be known as the Mt. Ranier National Park. By Section 3 the Northern Pac. *Railroad* Company, upon relinquishing to the Government the land comprised by the Park, which had been theretofore granted to the Railroad Company, was authorized "to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual Government survey, which has been or shall be made, of the United States, not reserved and to which no adverse right or claim shall have attached or had been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Paciefic Railroad Company runs, to the extent of the land so relinquished and released to the United States."

Section 4 provides:

> "That upon the filing by the said Railroad Company in the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law as in analagous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and delivered to said company a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed in said local land

office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

STATUTE UNIQUE.

This statute is unique in at least four particulars:

1. It requires that where land is unsurveyed the company in its selection *must describe the land with a reasonable degree of certainty.*

2. To be subject to selection it must be not only nonmineral in fact, but must have been *classified as non-mineral at the time of actual Government survey.*

3. Within three months after the plats of survey are filed in the local office a *new list* must be filed describing the tracts according to such survey.

4. If original selection shall not conform with the lines of the official survey the company shall be permitted to describe it anew so as to secure conformity.

No other statute, requiring the same construction, has ever been passed by Congress for the disposal of the public lands. By an agreement between the Department of the Interior and the Department of agriculture it was

decided that the company was entitled to select 444,222 acres in lieu of the estimated quantity of land conveyed to the United States. This is practically a half million acres, is equal to 700 square miles, or 19½ Twps., being an area more than half the size of the State of Rhode Island, and yet it is conceded by the Department and the Courts no circular was ever issued by the Department governing the selection and patenting of the lands to which the company would be entitled under this *unusual* statute; but, so far as the description of the land is involved in this case, as we shall show, *circulars under general statutes entitled to liberal construction have been cited to support what is conceded to have been a bad practice so shadowy and uncertain as that no authority could be cited sustaining it.*

V.

THE ISSUES PRESENTED BY THE RECORD.

This case presents three principal questions:

1st. The grant having been made to the Northern Pac. *Railroad* Company, a great corporation created by Act of Congress, and to which the Government had theretofore granted approximately forty-three million acres of land a part of which was to be reconveyed, could a selection be made by the Northern Pacific *Railway* company a separate and distinct corporation organized under the laws of Wisconsin, upon the ground that because of its purchase of the property and franchises of the *railroad* company under forclosure sale, it was its successor in interest?

2nd. The lands having been classified under the Act of March 26, 1895, as mineral, which classification was approved by the Secretary of the Interior March 26, 1901, a date prior to the selection by the company, and the surveyor having failed to make any classification in terms as non-mineral, was the land subject to selection by the Company under the Act of Mar. 2, 1899?

3rd. If the Railway Company was authorized to make the selection, and if the land was subject to the selection at the date it was made, was the description given of the land selected, in terms of a future survey, a compliance with the requirement of the statute that it should be described with *"a reasonable degree of certainty,"* so as to bar the rights of settlers in good faith without actual or constructive notice?

We will take up these questions in the above order.

FIRST.

Grantee Named In Act of March 2, 1899, Not In Existence at that Date and Grant Void.

The Trial Court referring to this question, stated:

> "It is, however, argued that as a matter of law, it would be held that the railway company could not be an assignee under, or otherwise profit by, the Act, for the grant is to the Railroad company and is not assignable. No decision is cited in support of the proposition, nor does plaintiff assign any reason, and apparently none is imaginable, why Congress should have intended

> to deny the right of assignment, or to confine the operation of the grant to the railroad company to the exclusion of its successors in interest." (Record p. 76).

The Court then cites opinions of the Attorneys General, 21 Ops. 486, 25 Ops. 401, and other authorities. The Court also held:

> "It therefore appears that the construction contended for by the plaintiff would render the Act nugatory. For, if this conclusion is correct, and admittedly it is not open to review upon the record here, it turns out that at the time the Act of 1899 was passed, the railroad company was not possessed of the lands desired by the Government, but that its rights thereto had passed to the Railway Company, and unless we hold either that by inadvertence the Railroad company was named while the railway company was intended, or that the privilege conferred upon the railroad company is assignable, plainly the Act becomes wholly ineffectual for any purpose." (Record pp. 76, 77 and 78.)

The Court evidently misunderstood the point involved. It is not whether the Railway company could *assign* or transfer title to lands granted to it under the act of 1864, but, whether the new grant of 1899, to that company, which then had no existence, could be taken by the Railway Company, as a substituted grantee, and in its own name select the land granted.

Attorney General Harmon in the opinion cited by the Trial Court (21 Ops. 486) dated Feby. 6, 1897, in answering the question submitted advised that the Department should act upon applications for patents by

the Railway Company under its grant upon the same considerations which should govern it in case there had been no forclosure and applications had been made by the old company.

In that case the Attorney General pointed out that prior to the date of the Act of March 2, 1899, both the property and franchises of the Northern Pacific *Railroad* Company had been sold and transferred to the Northern Pacific *Railway* Company.

This question was again submitted to Attorney General Moody, who on April 12, 1905, held that the opinion of his predecessor was correct and that the Department should continue to be governed by the rule there laid down.

By Act of July 2, 1864, a Federal corporation, known as the Northern Pacific Railroad Company, was created and the first Board of Directors named therein. Said Act is referred to constantly as the "Charter" of said corporation and is so referred to in the Joint Resolution of May 31, 1870. By the last Section in said Act of 1864, it was expressly declared that Congress should have the right to add to, alter, amend or repeal the Act.

Section 10 of the Act expressly provides:

> "No mortgage or construction bonds shall ever be issued by said company on said road, or mortgage or lien made in any way except by the consent of the Congress of the United States."

The Joint Resolution of 1870, authorized the Railroad Company to mortgage all its property and franchises, *including the franchise to be a corporation.*

The record of the forclosure reveals the fact that the franchise to be a corporation was mortgaged, as authorized by said Joint Resolution, the complaint asked for its sale, the Company in its answer admitted the facts stated in the Bill, the decree specifically provided for its sale and *it was sold* to a committee of the bondholders of the Company in August 1875. (See Smalley's History of the Northern Pacific Railway Co. p. 209.)

It is conceded that the Railway Company, the present claimant, as successor in interest, was organized and a charter granted in Wisconsin in 1896.

What is the effect of these transactions on the question of the existence, or nonexistence of the Northern Pacific Federal corporation in March 2, 1899, the date Congress made the grant to it?

The opinions of Attorneys General Harmon and Moody that the Railway Company is the successor in interest of the Railroad Company and that patents for lands *granted by the Act of 1864* might be issued to it, even if sound, presents an entirely different and irrelevant question. These opinions may be conceded to be right, and yet they in no wise affect the question at issue and we must be permitted to say that in view of the uniform holding of the Department that they are separate grants and that the Act of 1899 was no part of the adjustment of the grant of 1864, and hence the Act of 1895 providing for the classification of the lands granted by the Act of 1864, as well as other acts, had no bearing upon the execution of this Act, because it was a *private special Act*, we are surprised that these opinions of the Attorneys General are made to do duty in behalf of the Railway Company as if they were applicable.

It is possible Congress assumed there was such a corporation in existence and that it still owned the land to be

conveyed in exchange for the right by it to select other lands as provided, but *Congress was mistaken,* for there was no such corporation and of course no such ownership of the land to be conveyed, nor could it be the grantee to which the grant was made. *There was none,* and hence the grant is void.

The Courts make a distinction between the franchise to operate a Railroad or other Company, and a franchise to be a coporation, holding that if this latter franchise is not sold, it still has an existence, although all its property and all its other franchises have been legally sold. But in this case, as we have shown, this franchise to be a corporation was mortgaged as specifically allowed by the resolution of 1870 and the mortgage duly foreclosed and this frachise specifically decreed to be sold, and it was sold.

If, then, after the sale the franchise to be a corporation, created by Act of Congress and authorized to be mortgaged and sold, had any existence (which we think doubtful), the action of the purchasers in taking out the Wisconsin corporation destroyed any vitality it may have had after the sale. As said by the Supreme Court of Ill. in the case of Poe v. Wayman, 256 Ill. 151, (99 N. E. 941).

"Eternal life is not an essential attribute of corporate existence."

It would seem to be an unusual application of the doctrine of "reincarnation" to hold that the purchasers of this franchise to be a federal corporation, could, by the purchase of the Superior and St. Croix R. R. Co., a Wisconsin corporation, and having the legislature of that State amend it and incorporating in that State under the name of the Northern Pacific *Railway* Company and

increasing its capitalization, so "reincarnate" the entity, or as expressed by some of the authorities, "the soul" of the original Northern Pacific *Railroad* Company, thus abandoned, as to preserve its existence from 1896, until the date of the grant in 1899. Attorney General Harmon in (21 Ops. 486), stated that:

> "Although the Joint Resolution of 1870, *supra*, authorized a mortgage on all the property of this Company, including the franchise to be a corporation, the counsel in charge of the reorganization were certainly justified under the decisions in advising a new Act of Incorporation instead of endeavoring to work out the transfer of the corporate existence of the old company to the new one through the foreclosure proceedings."

It follows that, at the date of the Act of March 2, 1899, the Northern Pacific Railroad Company chartered by Act of Congress in 1864, had no existence and hence there was no grantee to take and the grant is therefore, absolutely void. Pawlett v. Clark 9 Cranch. 331; Hall v. Russell, 101 U. S. 509; Davenport v. Lamb, 13 Wall. 418; C. & O. R. R. Co. v. Miller 114 U. S. 176; Howard v. C. & O. R. R. Co. 122 U. S. 122, and Julian v. Central Trust Company 193 U. S. 93, citing Memphis & Little Rock R. R. Co. v. Railroad Commissioners 112 U. S. 619 Sellers v. Union Lumber Co. 39, Wis. 525 C. Y. C., Vol. 19, p. 1460. "The sale of all the franchises and property of a corporation extinguishes it." Reynolds v. Condge, 11, Pa. co., Ct. Rep. 306; Shields v. Ohio, 95 U. S. 319, and Pacific v. Chicago & St. L. R. Co., U. S. 7, Court of Appeals, Jan. 20, 1892, and 15 L. R. A. 82.

So far as we are aware, this precise question has never been directly passed upon by this Court.

There is no evidence in the record in this case tending to show the right of the Northern Pacific *Railway* Company to select lands under a grant to the Northern Pacific *Railroad* Company.

This Court in the case of Humbird v. Avery, (195 U. S. 480), declined to hold even that the Railway Company is the *successor in interest* of the Railroad Company, contenting itself with the statement in parenthesis that it is " the alleged successor in interest of the Northern Pacific Railroad Company."

Foreclosure suit by the Farmer's Loan & Trust Co. et al., was instituted in the United States District Court for the Eastern District of Wisconsin in 1896 against the Northern Pacific Railroad Company (?) and others on mortgages executed by the Company in May and Sept., 1879, January, 1881, Nov. 20, 1883, Dec. 1887 and Dec., 1889, upon all the property and franchises of the company including the franchise to be a corporation and on the 27th day of April, 1896, a final decree of foreclosure and order of sale of all said property and franchises, including the franchise to be a corporation was made, was ordered sold, and as we understand, was sold to the Northern Pacific Railway Company, a Wisconsin corporation and the sale was confirmed, and the Railway Company claims under this sale. See Heath v. N. P. Ry. Co., 38 L. D. 77.

Another serious question arises whether the right given the company to mortgage under the Joint Resolution of 1870, was not exhausted by the mortgage made that year and which was foreclosed and all the property sold in 1875. If so, the Committee of Bondholders who purchased and called themselves the Northern Pacific Railroad Company was without power to make the mort-

gages upon which said property and franchises were sold to the Northern Pacific Railway Company. However this may not be material to the issues in this case.

From this decision and these opinions it seems clear that by virtue of the forclosure proceedings and Masters sale, not only the property of the Northern Pacific Railroad Company was forclosed and sold but its franchises including the franchise to be a corporation were likewise sold and purchased. That this took place prior to the date of the Act of March 2, 1899, seems to be also conceded. What is its effect as a question of law? Mr. Justice Story in speaking for the Court in Pawlet v. Clark, 9 Cranch 331, held as follows:

> "In general no grant can take effect unless there be a sufficient grantee then in existence. This, in the case of corporations, seems pressed yet further; for if there be an aggregate corporation, having a head, as a Mayor, and commonalty, a grant or device made to the corporation during the vacancy of the headship is merely void; although for some purposes, as to the choice of a head, the corporation is still considered as having a legal entity."

In the case of Hall v. Russell, 101 U. S. 509, Chief Justice Waite, speaking for the Court said:

> "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee."

Under the Common Law as held in Davenport v. Lamb, 13 Wall. 427, "a grant to a deceased party is as ineffectual to pass the title of the grantor as if made to a

fictitious person; and the rule would apply equally to grants of the Government as to grants of individuals."

If, then, prior to the date of the Act making a grant to the Northern Pacific Railroad Company its property and all its franchises had been sold and conveyed under orders of the Court upon foreclosure of mortgage or trust executed by said Railroad Company it must follow that there was no grantee in existence at the date of the grant to take thereunder. C. & O. Co. v. Miller, 114 U. S. 176; Howard v. C. & O. Co., 22 U. S. 222.

The Supreme Court in Memphis etc. RR. Co. v. Berry, 112 U. S. 609, referring to judicial sale of the franchises of a corporation said:

> "It is not claimed that the assignment of the charter, by way of mortgage and subsequent judicial sale, constituted the purchasers to be the identical corporation that the mortgagor had been; for that would involve an assumption of its obligations and debts as well as an acquisition of its privileges and exemptions; but, it is insisted, that it resulted in another corporation in lieu of the original one, entitled to all the provisions of the charter, by relation to its date, as though it had been organized under it.
>
> But such a construction of the words authorizing a mortgage of the charter and works of the company, is, in our opinion, beyond the intention of the law and altogether inadmissible.
>
> There is no express grant of corporate existence to any new body."

The same is true in the case at bar. The act of 1864, contained a provision prohibiting the company from mortgaging its property or its franchises. The Joint

Resolution of 1870 modified this provision so as to give the company the right to mortgage all of its property and its franchises, but there is no provision authorizing corporate existence to any new body.

The argument of the Trial Court to the effect that such a holding would render the Act ineffectual for any purpose, quoting M. K. & T. Ry. Co. v. K. P. Ry. Co. 90 U. S. 491, loses all of its force when the well settled doctrine of the courts as laid down by Justice Baldwin, speaking for the Court as early as the case of U. S. v. Orredondo 6 Pet. 739, and followed ever since, holding that— "grants of the strongest kind, do not extend beyond the meaning and intent expressed in them, nor by any strained construction, make anything pass against the apt and proper, the common and usual signification and intendment of the words of the grant, and passes nothing but what was owned," is applied. Moreover, Congress is not to be presumed to have used words for no purpose. Platt. v. U. P. Ry. Co. 99 U. S. 58; Allen v. Louisana 103 U. S. 84 and White v U. S. 191, U. S. 551.

The Court also held in Wiggins Ferry Co. v. East St. Louis, 107 U. S. 371, that "it is a rule of interpretation that every grant from the sovereign authority is, in cases of ambiguity, to be construed strictly against the grantee and in favor of the Government." See also U. S. v. Michigan 190 U. S. 401; Ill. Central Ry. Co. v. Ill. 146 U. S. 468; Kean v. Calumet Canal Co., 190 U. S. 488; Wis. Central R. Co. v. U. S. 164 U S. 190; Oregon etc. R. Co. 164 U. S. 539 and Oregon R. & N. Co. v. Oregonion R. Co. 130 U. S. 1.

SECOND.

Land Classified as Mineral and Therefore not Subject to Selection Under the Act.

We come now to the consideration of the question whether the land involved in this case was subject to selection at the date the list of the company was filed, for it will be conceded that if the land was not subject to selection under the Act the company's title must fail.

The decision of the Commissioner sustaining the selection against the claim of West states that the land was classified by the Board of Land Commissioners appointed under the Act of Feb. 26, 1895, during the month of October 1899, which classification was approved by the Department March 26, 1901. (Record p. 64). This was three months before the filing of the company's list. What is the force and effect of this classification, approved by the Secretary, prior to the selection?

The Commissioner held that because the Board of Land Commissioners were instructed, June 25, 1895, (20 L. D. 571) to examine for the purpose of classification, "odd numbered sections within the grant only" (Record page 64) this land which, when surveyed proved to be an even numbered section, the classification was without authority. (Record pages 64 and 65).

We might answer this contention by the conclusive fact that the Secretary notwithstanding this instruction, subsequently approved the classification by the Board, of this identical tract. It will be conceded this instruction was a Departmental regulation only, and when the Secretary subsequently approved the classification it had the effect of either waiving or overruling this letter of the Commissioner of the General Land Office to the Board which was approved by the Acting Secretary and is improperly called a regulation. That it is of later and higher authority we think admits of no doubt whatever.

The Interior Department held in the case of Lamb et el., v. N. P. Ry. Co. 29 L. D. 102, where the Secretary of the Interior approved the classification, that in order to set it aside such a showing of fraud in the classification must be made as would condemn and avoid it, if sustained by proof produced at the hearing. To the same effect is the decision in 29 L. D. 675. The original instructions by the Department under this Act of 1895, signed by Secretary Hoke Smith, Apl. 13, 1895, (20 L. D. 350), did not make any distinction between the classification of odd and even numbered sections and it was not until June 25, 1895, that this distinction was made. The act is plain and unambiguous and needs no construction. State Tonnage Tax cases, 12 Wall 204. Moreover, we insist that the *act* authorizing the classification made no such distinction and that the instructions and decision of the Department, which *has* been followed by the Trial Court and the Circuit Court of Appeals were contrary to both the letter and spirit of that Act. It provides in terms, that the Secretary of the Interior, be, and is hereby authorized and directed, as speedily as practicable,—"to cause *all* lands within the land districts hereinafter named in the States of Montana and Idaho *within the land grant and indemnity land grant limits*

of the Northern Pacific Railroad Co. as defined by Act of Congress entitled etc.," * * * * * "to be examined and classified by Commissioners to be appointed as hereinafter provided, with special reference to the mineral Or non-mineral character of such lands, and to *reject, cancel, and disallow* any and all claims or filings heretofore made, or which may hereafter be made, by or on behalf of the said Northern Pacific Railroad Company on any land in said land district which upon examination shall be classified as provided in this Act as mineral lands."

It is thus seen that *all lands* within the land districts mentioned within the land grant and the indemnity land grant limits of the Northern Pacific Railroad Company were to be examined and classified and the Secretary was instructed by the Act to *reject, cancel, and disallow any and all claims or filings, heretofore made, or which may hereafter be made, by or on behalf of said Northern Pacific Railroad Company classified as mineral lands.*

Section 3 of the Act provides that: "If the lands examined are not surveyed, classification shall be made by tracts of such extent and designated by such natural or artificial boundaries to identify them, as the Commissioners may determine."

Again the instructions relied upon by the Departmental decision, referring to the classification of unsurveyed lands stated: "observing the difference that the land must necessarily be described by natural objects and permanent monuments to identify the same" etc. Why *"necessarily"* so described? Simply because they could not know what would be odd or even sections as recognized by the Secretary as a proper construction of the Act. The instructions issued by First Ass't. Secty. Pierce, July 26, 1910, (39 L. D. 116), for carrying into

effect the extension of the Act of 1895, dated June 25, 1910, repeated this instruction as to unsurveyed land to be classified by the Board.

Section 6 provides that: "As to the lands against the classification whereof no protest shall have been filed as hereinbefore provided, the classification, when approved by the Secretary of the Interior, shall be considered final, except in case of fraud, and all plats and records of the local and general land offices shall be made to conform to such classification."

It is thus seen that where lands surveyed or unsurveyed, odd or even sections are classified by the Commissioners and approved by the Secretary, in the absence of protest, this action is made by positive statute *final* and can be set aside only upon the ground of fraud. Moreover, it is made the duty of the Secretary to have the records of the local and the General Land Offices correspond with this classification and to reject, cancel and disallow any and all claims or filings theretofore made or which may thereafter be made by or on behalf of said Northern Pacific Railroad Company. The attention of the Commissioners was specifically called to the finality of this classification in the Instructions of Apr. 13, 1895, and they were cautioned to exercise great care for this reason.

Now, it is conceded that at the date of selection the tract involved had been classified by the Commissioners under the act of 1895 as mineral, which classification had been approved by the Secretary and the records made to conform to this classification, which, by the terms of the statute is made final, unless attacked for fraud. How then, we ask, could the Railway Company as the successor of the Railroad Company make a valid selection of this land?

The real situation is this:

In june 1901, when the Railway Company made its selection this land was classified as mineral, which classification was made final by statute unless attacked for fraud. How then could the land be selected as *non-mineral* as required by the Act of March 2, 1899? We are answered, not by the statement that this classification was attacked for fraud and the approval of the Secretary set aside, but that when the land was surveyed the Surveyor having said *nothing whatever about whether the land was mineral or non-mineral,* but only stating that it was heavily timbered, covered with undergrowth and valuable for grazing, that this had the legal effect, not only of setting aside an *approval which was made final by statute* that the land was mineral, but that it amounted to a "classification" as *non-mineral,* which alone made any land subject to selection under the terms of the Act. Certainly both these positions are untenable and cannot be sustained.

What does the phrase: "non-mineral public land *so classified as non-mineral* at the time of actual Government survey, which has been or shall be made" require? Does it require an affirmative classification as non-mineral, or a negative one; a positive classification or merely an inferential one? The affirmative must be shown. Fertilizing Co. v. Hyde Park, *supra.*

There can be no mistake about the intention of Congress for no more apt words could have been chosen to designate the only class of public lands which the company would be permitted to select. The language is plain and unambiguous and there is no room for construction. As it is a private grant it is mandatory and must be strictly complied with. It is the measure of the right of the Company to select any land, and as it has been

accepted in its precise terms no other classification can be allowed to take the place of that so particularly described by the terms of the Act. We apprehend all of this will be conceded.

Let us, therefore, take the admitted language of the surveyor and see whether it is such a strict compliance with the requirements of the Act as to make it subject to selection thereunder in the face of the classification by the Board under the Act of 1895.

Judge Dietrich in his opinion stated the question was not free from doubt, but contrary to the rules of construction of private grants, solved the doubt in favor of the Company, instead of the Government. However, he based his construction upon the theory that it was merely modal and incidental. On the contrary, it is *the only limitation* placed on the right of the company to select any unoccupied and unclaimed public land in any State through or into which its road runs. It is a *positive limitation to be fixed at a specified time by a specified officer.* No land not thus classified could be subject to selection whether mineral in fact, or not. The Trial Court held also that "the absence of a classification as 'Mineral' is equivalent to and is to be understood as 'a classification of non-mineral.' " Let us see about this:

The commissioner's decision states:

> "The subdivisional survey of the Twp. was made in 1903, and the Deputy Surveyor who made the survey reported that *the land if cleared would be suitable for grazing, but at present is more valuable for its timber.*" Record p. 65.

Now, it might be either or both of these and still be mineral. Lands valuable for their mineral deposits can be disposed of only through the mining laws. Coleman

v. McKenzie, 28 L. D. 348, citing Mining Co. v. Consdt. Mg. Co. 102 U. S. 167; Deffenback v. Hawk, 115 U. S. 404, and Coal Co. v. U. S. 123, U. S. 327.

No one can doubt that the lands thus described might *be valuable for their mineral deposits.* They had been so classified and the classification approved by the Secretary. To hold this description to be a non-mineral classification, the contrary must be assumed, viz, that lands suitable for grazing when the timber is removed but with the timber standing, is more valuable for the timber, could, *under no circumstances be valuable for its mineral deposits.* This seems to us to be an absurdity.

ACT OF FEBRUARY 26, 1895, A SPECIAL ACT.

The Act of Februay 26, 1895, is also a special Act and the authorities hereinbefore referred to in support of our contention that the Act of Mar. 2 1899, being also a special Act, its provisions must be strictly followed, are applicable also to the former Act.

The Department in the case of N. P. Ry. Co. 40 L. D. 64, in constructing the Act of March 2, 1899, held:

> "It is true that the land selected by the company may not in fact be mineral but under the terms of the Act which authorizes the company to select lands in satisfaction of those relinquished by it, it is not believed that the Department can inquire into the question as to whether or not the lands are mineral where they are not classified as non-mineral by the return of the surveyor." ***

The Department quoting the decision of the Circuit Court of Appeals of the Ninth Circuit as authority in the case of Northern Pacific Ry. Co. et al., v. United States 176 Fed. Rep. 706, further states that:

> "Congress has thus established a rule of evidence by which the Department must be controled." If the lands are classified as mineral they are not subject to selection by the company, while, if classified as non-mineral, while subject to selection the Government must still inquire into their actual character."

"Classification" has a well understood meaning in land laws and practice, the Geological Survey having been organized for the purpose of classifying the public lands, particularly as to their mineral or saline character. It is the usual practice now for that Bureau to classify lands and wherever there is any doubt, the matter is submitted to the survey for examination and report. Surveyors are not usually instructed to *classify* land. Their instructions go almost if not quite wholly to the question as to whether the lands are heavily timbered, covered with undergrowth or mountainous with a view to fixing the compensation of the surveyor, as a different rate is fixed for these classes of lands. In the case at bar this, and this only, was done by the surveyor at the time of actual survey. Not one word can be found in his returns as to whether there is mineral or not and certainly he did not attempt a classification. But even if it be conceded that for the ordinary purposes of the disposal of the public lands where no question is raised, the absence of any mention of mineral might be sufficient to justify the Land Department in disposing of the land as agricultural land; yet, in an Act which we have seen upon two separate and distinct grounds must be strictly construed against the company and in favor of the grantor, and where the land had been classified as mineral under a statute which also requires the same construction, which classification had been approved by the Secretary of the Interior prior to the date of selection, it would seem to us but little less than absurd to say

that in view of these facts and circumstances the failure of the surveyor to say anything whatever upon the subject of mineral or non-mineral would be a compliance with the law and make the land subject to selection by the company.

We come now to the consideration of our third proposition, viz, that a description in the terms of a future survey is not only a failure to describe the land "with reasonable certainty," as required by the Act, but is no dsecription at all and is therefore absolutely void foi any purpose.

THIRD.

THE ATTEMPTED DESCRIPTION OF THE LAND GIVEN IN THE SELECTION IS VOID FOR UNCERTAINTY.

We are not disposed to quarrel with the Circuit Court of Appeals in its adoption of the Century Dictionary's definition of the term "designate". . . As quoted it is as follows:

> "To mark out or indicate visible lines, marks, description, name, or something known and determinate."

Unfortunately for the argument of the learned Court, none of the definitions given are applicable to the case under consideration.

It will not be contended that a description in the terms of a future survey is "to mark out or indicate by visible lines, nor by marks, nor description. If it falls under any definition given at all, it must be under the last and least preferred definition, viz: "name, or something known and determinate."

Was there any section *20* or even any township 44 N. R. 3 East, *known* at the date of selection? There was not and there might never have been any such section. It was, therefore, *not "known"* and of course was "not determinate."

There are only two possible descriptions of land, viz, one by marking on the ground or by reference to natural objects, which is a *description in fact*, and the other a *description in law*. In the last analysis there is only one, as a description in law presupposes and is based upon a marking on the ground. That is, a *legal survey*. In public lands it is a description in law *only* after the approval of the survey by the Commissioner. Anything else is no description and no designation. F. A. Hyde et al., 40 L. D. 284, citing U. S. v. Montana Lumber Co. 196 U. S. 573.

Until the approval of the survey by the Commissioner there is *no survey* as surveys in the field are often amended, materially changed to comply with the recommendation of the Examiner of Surveys in the field, and not infrequently they are entirely rejected, and new surveys made marking the lines differently from the former survey. It follows, as hereinbefore stated that, until the approval of the survey of this township, there was no such thing as Section 20 known or knowable.

The Court in the case at bar first applied this definition to a tract lying adjoining a subdivision already surveyed, then moved step by step further to the point

where it is stated Section 20, the tract designated to be selected by the company. "is situated three miles south of Section 32, in Twp. 45, a surveyed township and could be readily located from such survey although in a rough country."

We beg to state here and now that the Court is mistaken in both propositions. It is neither three miles south of the Twp. mentioned nor is it due south of Section 32 as stated, which we will demonstrate hereafter. It is conceded by the Court that such a description of itself is not sufficient and is no compliance with the law, but that relying upon the maxim "that is certain which can be made certain," the argument is made that the description might be made certain by measurement from the Ninth standard parallel which is the South boundary of the township immediately north, a proposition which is contrary to the statute and the Manual of Surveying, as this line has nothing whatever to do with the survey of the township south and if relied upon would make all measurements erroneous.

The Act of Feb. 11, 1805, which has controlled the public land surveys for more than a hundred and ten years provides as follows:

> "The boundary lines actually run and marked * * * * shall be established as the proper boundary lines of the section or subdivision for which they were intended; and the length of such lines as returned * * * * by the surveyors * * * * shall be held and considered as the true length thereof."

Moreover, the Act of 1805, and the Manuel of Surveying requires that in all cases, except where there are special instructions, surveys must be made from the S.E.

corner, north and West throwing the fractions on the north and west sides of the township. In the West case special instructions directed the Surveyor to commence at the S. W. corner which had been established and instead of throwing the fractions on the north and west as found by measurement from the south and east, they were calculated and added on the north and west. It is perfectly clear that no one except an expert familiar with the system of surveying could have made these convergencies and certainly no one could have known until the special instructions were approved how the survey of the township would be made.

Will anyone contend that until the survey is made and approved, there is in existence any section of any particular unsurveyed township? We apprehend not. The township may never be surveyed, or if surveyed in the future, it may be fractional, as the location and survey of quartz mining claims or elimination of lands for forestry or other purposes might so change the survey of the remaining land as that there would never be any section 20 in existence. Such a designation amounts simply to the statement that the Railway Company expects in the future to assert title to some unknown tract of land which may be at some time designated by survey as Section 20 of a particular Twp. and Range. Such a designation was not inaptly described by First Ass't Secretary Jones in 42, L. D. 259, as an "*expected or hypothetical description.*" It is not a designation of a known quantity and does not purport to be a description of land at all. And when it is considered that it is not a question between the Railway Company and the Government only, but unless it can be held that Congress intended by the enactment of the Act of March 2, 1899, to place all intending settlers from that date, to some indefinite future date when the survey might possibly be made, at the mercy of the Railway Company, and to

require each and every settler to employ an expert surveyor who could not possibly under any circumstance determine the exact location of the selection by the Railway Company by this unknown and non-existent number, to settle at his peril, this contention cannot be sustained.

The statute requires that:

> "In case such tract as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity.

To our minds, aside from the description of the class of lands which may be taken under the Act, this is the most important part of the statute and proves conclusively that a metes and bounds or natural object survey was intended by Congress in the enactment of the law. If not, why require this new list? A homestead settler is simply required to adjust his lines to the lines of survey. Moreover, how could there possibly be a lack of conformity when no land is described and no lines marked which could require conforming? If a metes and bounds or natural object description was given, based, it might be, upon a private survey by an expert, there would be in many, in fact most instances, lack of conformity; but there could be none where the only description was the particular land which the surveyor might find corresponded on the ground with this number, which was not in existence and could not be until the survey was made and approved. It seems to us that if the statute had said in so many words that the company, if it chose to select unsurveyed land, which it was not required to do, it should make a metes and bounds or

natural object survey as all parties have been required to do for many years, the requirement would have been no more convincing that such was intended, than this requirement of a new list and a conformity with tracts selected and described in the list originally filed.

It is conceded by the Department and by both the Trial Court and the Circuit Court of Appeals that such a description is not certain within itself, but as stated by the Circuit Court of Appeals, "that is certain which can be made certain." But is this rule applicable to this statute, and if it is, do the facts bring it within the rule? In Broom's Legal Maxims, under this head, in a note, it is said: "If a King's grant refers to another thing that is certain, it is sufficient:" 7 Ed. pp. 624 and 625. The Court also states (Record p. 109).

> "It may be conceded in so far as it respects this case, that a description of a section or a quarter section by legal subdivisions in the fastness of the cascades or Rocky Mountain Ranges far distant from any Government survey, or even generally that a description in terms of future survey, is not such a description as is contemplated by the statute. * * * * * Everyone is presumed to know the methods by which the Government surveys are made, and what is meant by township and range and what by section and quarter section, or other legal subdivisions and the relation of one township to another and of one section with its subdivisions to another."

In the first place we may be permitted to ask whether under a statute which requires strict construction and the procedure provided in the statute must be strictly followed and which requires the company in the selection of unsurveyed land to "describe such tract in such

manner as to designate the same with a reasonable degree of certainty," falls within the class mentioned by the Court where resort must be had to extraneous facts and surrounding circumstances in order to give it any degree of certainty whatever? Does not this statute require the selector to designate the land in such manner as that reliance would not have to be placed upon any outside circumstances to make it a description of any kind?

It is an easy matter for the Department or the Courts to say that in a mountainous heavily timbered country as stated by the Circuit Court of Appeals, a tract of land in the interior of a township could be readily located at a distance of three miles, but it is notorious that no two surveyors however competent could make precisely the same measurement over three miles of such ground. The Court in support of its view quotes the testimony of Olaf Edin, a witness for the plaintiff, to the effect that he helped run the exterior lines of the plaintiff's claim stating: "We undertook to tie them up to the Government lines which had already been run as near as we could." But the learned Court failed to mention the further statement of Edin that the line he blazed around the cabin varied from the survey about a quarter of a mile, or nearly a quarter one way and the other way a few rods. (Record p. 341).

The records of the survey of this township will show that if even an expert surveyor had undertaken to locate Section 20 as three miles due south of Section 32 in the Twp. 3 N. he would have located it on a part of the S. E. ¼ of Sec. 21 as there is a jog of 16.90 chains between the S. E. corner of Section 32 and the closing of the line between Sections 21 and 22 on the 9th standard parallel. He would also have located it or at least a portion of it in Sec. 29 as the distance from the South line of the Twp. mentioned to Section 20 is less than 3 miles and a meas-

urement of three miles would have thus located it. (See Letter of the Asst. Commissioner of the Land Office dated March 31, 1916, with diagram marked Appendix A. Also copy of Township plat marked Appendix "B" and by reference made part hereof).

It would hardly be contended that any but an expert surveyor could, even if he knew how the Government survey was to be made, locate with any degree of accuracy over this mountainous timbered country a tract of land in the neighborhood of three miles from a surveyed line *which had nothing whatever to do with the subdivisional survey of the township.*

The Courts have held that a description intelligible only to an expert is not sufficient in a replevin suit. N. Y. Appl. Div. in Thorne v. Lazarus Vol. 39, p. 508, 57 N. Y., Suppl. 279, and in Van Dyke v. N. Y. State Banking Company, 18 Misc. (N. Y.), 661, 43 N. Y. Suppl. 735. See also Board of Education v. Crawford, West Va., 790, quoting approvingly Gorman v. Stead First West Va. 14.

Under the statute and the Manual of Surveying, subdivisional surveys are made from the East and South throwing the divergencies on the north and west as was done in this case. From the letter of the Commissioner (Appendix "A") it will be seen that the survey was not commenced from the South boundary of the Twp. immediately north, which is the ninth standard parallel as it would have been contrary to Departmental regulations and the Surveyors instructions, but in point of fact it was initiated at the corner of Twp. 43 and 44 North, ranges 2 and 3 east which had been established in 1901. The fact that the survey was initiated from this corner is unusual and was controlled by special instructions which no one could have known would be

the case until the approval of such instructions. Ordinarily it would have been initiated from the 8th standard parallel and a line run to the S. E. corner of the township from which the survey would have been made and actual measurements made throwing the discrepancies by actual measurements on the North and West sides of the township instead of allowing for the meridianal convergency from the S. W. corner of the township where the survey was commenced, all of which shows how uncertain any attempted measurements with a view to the actual location of any tract would be found.

All of this argument, however, is based upon the position taken by the Department and the Trial Court as well as the Court of Appeals that the designation of Sec. 20, which did not exist, and was a figment of the brain only at the time of the selection, could have been made certain by a settler by measurements on the ground. If we are right in our position that construing the Act strictly, the company was required by its terms to designate the tract with reasonable certainty and that the statute means precisely what it says, it is immaterial.

In the Hyde case, 40 L. D. 284, construing the Act of June 4, 1897, the Forest Lieu Selection Act, which Act was a general statute and did not require the same particularity of description of unsurveyed lands as the Act under consideration, held:

> "Where the lands applied for are unsurveyed until approval of the township plat of survey, are not identified unless they are identified in fact."

It was further held:

> "An identification in terms of a future survey previous to that time was not possible, either by the unofficial protraction of the lines of subsisting public surveys, or by a private survey of any character—citing U. S. v. Montana Lumber Company 196 U. S. 573 and cases therein cited."

VI.

DECISIONS OF THE COURTS.

That case cited approvingly the case of Central Pacific Railroad Company v. Nevada—162 U. S. 512, wherein Mr. Justice Brown speaking for the Court used the following language:

> "The lands granted to the railroad company were the odd numbered sections within the limits of 20 miles on each side of the railroad, except such as had been sold or otherwise disposed of by the United States or to which a homestead or preemption claim had attached, or mineral lands.
>
> "Until the surveys were made it cannot be known what part of the lands are within the enumerated exceptions, or what sections or parts of sections will belong to the company, nor until then can the locality of the lands be determined so that a description may identify them.
>
> "It must be borne in mind that the unsurveyed lands are not described by metes and bounds or by common designation or name but as sections and parts of sections, and, as alleged by the complaint as their designation will appear when the surveys of the United States are extended over them. It is plain that this is not a description by which the identity of the land can be establish-

ed, and is equally plain that possession of the lands cannot be established until the surveys are made."

In a suit by the Bird Timber Company v. Snohomish County, et al., to cancel taxes levied against the company for the years 1912 and prior years, the Supreme Court of the State of Washington (81 Wash. 416-143 Pac. 433), in a selection under the Act of June 4, 1897, held as follows:

"In the first place, we think the description of the property contained in the selection (in the terms of a future survey) is insufficient to designate any specific tract of property. At the time the selections were made there were not, nor is there now, any specific tract of land marked on the ground which can be located by the descriptions contained in the selections. It may be that in course of time the Government will survey certain lands, and denote them in the surveys in accordance with the descriptions in the selections contained in the Hayes selections; but it is reasonably certain it will not designate any tract in accordance with the description contained in the Goldberg selection.

"This tract, if the present system of surveys is pursued, will border on a township line, and will in all probability be fractional in quantity, in which case it will be designated in fact by lots numbered instead of the general description contained in the selection.

But be this as it may, *there is no means of ascertaining prior to the actual Government survey, what specific tracts of land will be included in the description.*

> It is true that the Act first recited (1897) allowed lieu selections to be made of unsurveyed public land. *But, to be effective as to particular tracts, they must have been made by metes and bounds with a description having the beginning point at some natural or artificial monument, which could be readily and definitely located on the ground.*"

The Court cited and quoted from the case of F. A. Hyde, 40 L. D. 254.

While these decisions are not based upon the Act of March 2, 1899, it seems to us they decide the principle involved in the position taken by the Department, the Trial Court and the Appellate Court as to the sufficiency of such a description under that Act. If, for the purposes of protection against an action for trespass for cutting timber, the Northern Pacific Railroad Company could not by surveys made by experts so locate an odd numbered section to which it was entitled under its grant by a private survey; or that under the Nevada statute such a section could not be so located prior to Government survey as to charge the company with being in possession for the purposes of taxation, we beg to ask how it would be possible for the company in the case at bar by such a description to protect itself against settlers prior to survey, or how settlers could be held to a more drastic system of making certain that which was uncertain for the purpose of protecting their homes, improvements and the years of residence required, than was possible for the State of Nevada and the Central Pacific Railroad Company with their vast resources to do by private survey made for the purpose of locating the lands to which they were entitled. None of these statutes and causes required stricter construction than does the Act of 1899.

VI.

THE DEPARTMENTAL DECISIONS.

The decisions of the Interior Department under the various administrations of that office have been so different, so uncertain and their various statement of facts so unreliable that it would seem this court would not be justified in taking any of them, as the trial Court and the Appellate Court seems to have done generally, without careful inquiry in order to ascertain the real situation. We make this assertion with the full understanding of what it means. It was but natural for the Courts to consider that a great Department of the Government having special charge of a subject in a matter of as much importance as the construction of this act involving nearly a half million acres of land, would be accurate in its statements particularly in its published decisions.

To illustrate our proposition we beg to state that the case of Hanson v. N. P. Ry. Co. was decided March 16, 1910, (38 L. D. 491). In that case the motion forreview was entertained June 9, 1909 and in the decision the Department stated:

> "At the time this motion was entertained this Department had grave doubts as to the sufficiency of such description (in terms of future survey) as against the claim of a settler subsequently initiated, and there was under contemplation then

> the formulation of regulations which would give more precision to such selection and afford settlers greater security in the matter of initiation of claims for such lands. Since that time that subject has been carefully considered by the Department and regulations have been issued which will give such precision and afford such security. Circular of Nov. 3, 1909, 38 L. D. 287."

Notwithstanding this published decision the Department in the decision of the case of Daniels v. N. P. Ry. Co., 43rd L. D. 381, decided by First Asst. Secretary Jones, August 3, 1914, more than four years after the decision of the Hanson case, stated (at page 384) the following:

> "The practice of describing unsurveyed land in in terms of a future survey thereof as being in existence for many years, and *was never challenged prior to the* decision of Hyde and others 40 L. D. 284."

The Hyde case was decided October 6, 1911, more than two years after the statement hereinbefore quoted from the Hanson case. This was a misstatement of fact which the Department had the opportunity to correct upon the motion for rehearing, but which it saw proper to entirely ignore.

The Circuit Court of Appeals quoted this statement at page 108 of the Record.

We have already seen the statement that the Government had determined to create this park and made the offer to the Railroad Company to induce it to convey the land, which was also followed by both the Trial Court and the Appellate Court, is not borne out by the records of Congress.

It was also stated in the Daniels case, that the Hyde case, supra, held as follows:

"Even in the Hyde case, cited and relied upon by the Appellant, it was unequivocally held such description was valid against the Government," when exactly the contrary was held and it was distinctly stated that the first *identification* of the land was when the survey was approved.

Opportunity was given the Department to correct this error, but it also was ignored. We set out in our brief liberal extracts from the letter of First Asst. Secretary Adams dated January 16, 1912, in answer to a letter of the then Commissioner of the General Land Office, who was evidently greatly perturbed over this decision which required a more definite description of unsurveyed land, for he pursued the most unusual course of writing the Department a long argument against the position taken in the decision, deploring its awful consequences in protecting the rights of settlers, and urging its recall or modification. This produced a temparate but most able and convincing answer to the argument of the Commissioner.

After stating what it did not say, the Secretary says:

> "It was, however, among other things, held therein that such a selection does not identify the lands in fact or in law; that pretended proofs of the non-occupancy and non-mineral character of lands not so identified are valueless; and that until identified in fact by appropriate marking upon the ground, or in law by the approval of the township plat of survey, lands so selected are subject to settlement by any qualified homesteader under the Act of May 14, 1880."

> "Prior to the adoption of the regulations of Nov. 3, 1909, (38 L. D. 287); *no general instruction* as to the selection of unsurveyed lands appear to have issued, but that prior to that time *special*

instructions were issued in the administration of a number of acts, etc., etc."

There can be no mistake as to what Mr. Adams understood this decision to mean, and what he did hold. With this understanding of what said decision held, he took up and considered the suggestions made by the Commissioner. In connection therewith he stated:

> "Passing from the field of administration based upon these statutory provisions, you further call attention to numerous proclamations issued by various Presidents of the United States covering a long period of time, and also refer to the case of Hanson et al v. N. P. Ry. Co., 38 L. D. 491, and certain unreported decisions, etc."

He then takes up the various matters urged by the Commissioner and states:

> "No good administrative purpose would be served by extended historical statements or analytical discussion of the many-sided allied propositions arising either directly or indirectly upon your statement of the matter. I must confine myself, for the present, to a few general observations upon the broad question presented and leave the details to consideration in due course of administration, I may say, preliminarily, that said decision of Oct. 6, 1911, was only reached after the most diligent study of the subject of selections of unsurveyed lands under the various Acts of Congress which permits such selections, and with a profound sense of its importance. I was not unaware that the conclusions therein reached were in some respect seemingly at variance with the views entertained, and the precedents established by preceding administrations. I was, however, and am still impressed with the thought

that such suggested variance is more seeming than real, at any rate, that the change is less comprehensive than your communication assumes." * * * * * * * *

He further stated:

"The fact that the Executive, in issuing proclamations withdrawing public land, has resorted to the method of description condemned in said decision of Oct. 6, 1911, furnishes no argument either as to the soundness of such method or basis of argument for its extension to locations or selections by individuals. A withdrawal on behalf of the Government has no analogy whatever to the case of a location or selection by a person in his own interest."

Referring to the Hanson case, it is said:

"The text of that decision does not show whether or not Hanson settled before survey, and for this and other reasons I do not at this time care to express an opinion as to the soundness of said decision." * * * * *

"In conclusion I have to say that in the study of the various acts of Congress, above mentioned, I was profoundly impressed with the thought that while they permitted and authoried the initiation of claims to unsurveyed lands, they all evidently contemplated that such lands should be identified in some appropriate and effective way. There is nothing in any of these Acts justifying another conclusion. If, in the administration of these laws, it has been assumed that identification would be accomplished by such description as is now contended for on the ground of precedent, such assumption was unwarranted.

> "To describe a tract of land as what will be, when surveyed, a certain parcel of the public domain is certainly indefinite. It means nothing except that in such case the selector thereby expects to initiate a preference claim to land somewhere without giving notice to other persons who may wish to make an appropriation under the same or other laws, and who, after he has gone upon the public domain, in pursuance of such lawful design and marked his claim, and perhaps cultivated and improved it, may be awakened years thereafter to find that it is lost to him by reason of a prior appropriation of which he had no notice either in law or in fact. The proposition, therefore seems to lead to a preposterous result, and in my opinion, cannot be entertained."

These statements leave no doubt whatever as to what Secretary Adams intended to decide in the Hyde case. It also furnishes a stronger argument than we could possibly make in support of our contention that such a description is utterly and absolutely void for any purpose. But, if for any purpose, this decision holds that it is no protection against settlers who settled before survey.

This was the clearly defined position of the Department in the matter of Forest Lieu Selections of unsurveyed land, requiring a metes and bounds or natural object description when the Northern Pacific Railway Co. applied to First Asst. Secretary Jones for, and obtained an oral hearing on the petition of Kip Calkins Miles and a number of other Homestead settlers, filed in 1911, asking the Secretary to exercise his supervisory authority and reverse decision against them and in favor of the Railway Company based on its selections of unsurveyed land in terms of a future survey. The hear-

ing was had and as the case of Mrs. Miles was the only one in which a hearing before the local officers had taken place and the record of the hearing was in the Department, and she was present offering to testify as to her lack of either notice, or actual knowledge, after most diligent inquiry, of the Railway selection, the arguments were addressed to her case and that of her associates in said petition. The Department for some reason unknown to us, took up the Daniels case, which was an application to contest, not mentioned at the oral hearing, in which the nearest surveyed line was one mile while the nearest point from which a survey could have been legally made in the case of Mrs. Miles was 12 miles. The case is reported in 43rd L. D. 381 and is made the leading case and the Miles case was ruled by it. Her motion for rehearing was denied and the Department declined to state the facts, and the land was patented to the Company while it was pending undecided in the Department. The case of F. A. Hyde, supra, and all other cases in conflict were overruled. This case is cited by the Circuit Court of Appeals as being an affirmance of the Hanson case and overruling of the Hyde case.

The Daniels case admitted that a metes and bounds or natural object description should have been always required, as it then was (and for many years had been), yet held that:

> "If a selection of a specific tract, identified by reference to a survey, be filed in the local office, the Register and Receiver are enabled to note the claim in its appropriate place."

This is an absolute impossibility and it was well known that it has not been and cannot be done with such accuracy as to even approximate the locality. However the gist of the Daniels case, omitting the many

pages of an attempt at defense of what was admitted to have been a bad practice and should never have been permitted and of the citation of numerous circulars not one of which was based upon a statute requiring a struct construction, but all of a general character or remedial acts requiring a liberal construction, laid down the following rule:

> "If, therefore, at the date of the selection any line of the public survey had been established in the vicinity of the selected land, it is not believed that a selection like the one under consideration lacks in fact, any element of reasonable certainty."

The District Court in the West case, quoted as authority in the Daniels case held, that such public survey must have been in the "immediate vicinity," the definititon of which is equivalent to *adjoining.*

The learned court of Appeals in the West case held as follows:

> "A description by legal subdivisions is a perfectly intelligible designation of a tract of land, so it must follow that a description which will be a legal subdivision when surveyed, if lying "*adjoining*" a subdivision already surveyed, is also a perfectly intelligible description."

It is true the Circuit Court of Appeals followed this by saying that to move a step further and up three miles, in that case, could be located by measurement.

It thus appears that the effect of the decisions of the District Court and of the appellate Court is that a perfectly intelligible definition of a tract of land when

unsurveyed is one lying adjoining a line or subdivision already surveyed, while the Department in the Daniels case stretched this definition to the "vicinity" of a surveyed line, from which it must follow that when leaving an adjoining line the domain of uncertainty is reached, requiring the services of an expert, which as we have seen the Courts hold cannot be required to make that certain which is uncertain, besides, it cannot be done even by an expert.

How would a sheriff or Marshall execute a decree requiring him to put John Doe in possessession of a tract of land described in terms of a future survey, especially when not adjoining any line of established survey? He would undoubtedly have to employ the services of an expert surveyor and then he could not know whether he was placing the party in possession of the right land or not.

Going back now to the terms of the Act. of Mar. 2, 1899, requiring the filing of a new list within 90 days after the filing of the plats of survey in the local office, which the Department held in the case of N. P. Ry. Co. v. Pyle 31 L. D. 396, was absolutely essential to protect the rights of the company against settlers.

Although the Daniels case like the one bar was not an ex-parte case, yet the Department dwelt long and eloquently upon the existence for many years of the practice of describing unsurveyed land in the terms of a future survey, quoting the Hanson case (38 L. D. 491). At the oral hearing we challenged counsel for the Railway Company and requested First Assistant Secretary Jones and those sitting with him, including the Commissioner of the Land Office, to point to any decision sustaining such practice. Their utter failure to do so, demonstrated at least to our mind, that there

was no such practice. And, even if there had been such a shadowey uncertain, loose, slovenly practice allowed in ex parte cases, it furnished no reason whatever why it should be allowed against settlers with unusual equities so far as residence and the endurance of hardships were concerned, in conflict with a private grant.

But in point of fact the practice, so far as it can be said any existed, was exactly the contrary. The Northern Pacific Railroad Company succeeded in getting Congress to pass the Act of Feb. 26, 1895, for the classification of lands within the limits of its grant in certain districts in Idaho and Montana, embracing the land in the case at bar.

April 13, 1895 (20 L. D. 350) ~~Senator~~ Secty Hoke Smith promulgated a circular of that date for the execution of the provisions of the Act. At page 353, after instructions as to surveyed lands the Commissioners were directed to examine and classify all unsurveyed lands, "*observing the difference* that the lands *must necessarily* be described by *natural objects and permanent monuments to identify the same, etc.*"

It may be said, as it was as to the circular Feb. 14, 1899, *supra, that it was issued before the date of the* Act of 1899 and is not applicable, although it applied to the particular land in controversy. If so, we desire to call attention to the fact that the company procured an extension of this Act June 25, 1910 and that under its provisions a circular was issued jointly by the Land Office, the Geological Survey and the Interior Department for carrying into effect this extension dated July 26, 1910, (39 L. D. 116) wherein at page 119, *the same language is used as to the description of unsurveyed land by metes and bounds or by natural object, as that above quoted in the Circular*

of April 13, 1895. If follows that the *practice* from April 13, 1895, at least to July 26, 1910, as it affected this particular *tract* and all other lands which were unsurveyed within the provisions of Acts of 1895 and 1910, *absolutely required a metes and bounds or natural objects description by the Commission.* Tis strange indeed the Department was unable to find these circulars.

In the case of the Northern Pacific Railway Company v. Amacker, 175 U. S. 564, this Court, Mr. Justice Brewer, speaking for the Court, said:

> "The contest in this case it between one claiming under a homestead entry and the company claiming under a grant in aid of the railroad. It was long ago said by this Court that 'the policy of the federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements over that of any other person' ***
>
> "There is no real hardship in enforcing this rule, for, if the individual seeking to maintain his homestead entry fails by reason of any defect he has no recourse on the Government for the fees he has paid or for any compensation for the time and labor he has expended, while, on the other hand, the general provision of the Railroad land grant is to the effect that if the title to any tract within the place limits fails the company may reimburse itself by a selection within indemnity limits. It is not, therefore, strange that the rulings of the Land Department, as well as of the Courts, have been uniformly favorable to the individual contesting with a railroad company the right to a particular tract of land."

This doctrine applies with peculiar force under the grant in this case which gave the Railroad Company a roving commission to select not only from a limited area embraced in indemnity limits, but any place within the States of Wisconsin, Michigan, North Dakota, Minnesota, Montana, Idaho, Oregon and Washington. It is also true that if the selection by the Company failed it can make another selection and "reimburse itself."

Let us see, however, how this beneficient doctrine, so often expressed by this Court, and on occasion by the Interior Department, is carried out by that Department in its decision between Railroad companies and settlers.

In the Hyde case, *supra*, and a subsequent letter of First Asst. Secretary Adams, we had reasoning based upon the just rights of both parties.

In the Daniels case, supra, although the Hyde case was overruled, this reasoning was unanswered. *It is unanswerable because it is just, exquitable and right.* The Department, in favor of the Railroad Company and against the settler, based its decision upon what is admitted was a bad practice and should never have been allowed, and applied circulars under other acts of a general or remedial character, and this too, not in an *ex parte* case but against the settler, forfeiting to the company all his improvements, the result of years of labor and privation. This was done while admitting this imaginary practice was wrong and had been long since abandoned. There was not even the argument advanced that because of this practice allowed by the Department the Railroad company had been led to make the selections as it did and thereby would sustain great loss unless this bad practice, not sanctioned by any Circular, but admittedly wrongfully allowed was sustained; but on the contrary the scrip used could be used on other lands,

or if put on the market would be more valuable than when it was originally filed. In other words, the company would sustain no losses, had no equities whatever, never having expended a dollar, if the decision had followed the humane, just and equitable decision announced by the Court above quoted from, and substantially followed in the Hyde case, which instead was overruled.

This is not all, in the construction of this Act by the Department, the company has fallen upon pleasant lines, and it is not strange that it did not insist upon any Circular of instructions so long as it could get all it asked for under construction of statutes passed for the benefit of settlers and which were entitled to liberal construction. To illustrate: The Department in the Hanson case, upon the authority of which the West case was decided (38 L. D. 491) declined to make the Circular of Nov. 3, 1909, retroactive on the ground that it was not in existence at the time of the location and it would therefore be unfair to apply it, although clearly in the interest of a better practice and the protection of settlers.

We thus have one decision holding a Circular issued before the date of the Act is not applicable for that reason, and the other that a later circular was not applicable because issued after the date of the Act, although made retroactive by its specific terms. It would seem to follow therefore, that in the view of the Department any Circular which tended to restrict the matter of selection of unsurveyed lands could not apply to the Railway Company under this Act, unless issued on the day of its date, and yet in the Daniels case a Circular under the Act of June 4, 1897, known as the Forest Lieu Act, dated May 9, 1899, (28 L. D. 521), after the date of the Act of March 2, 1899, is thus referred to and relied upon:

> "Indeed, in the instructions of May 9, 1899, (28 L. D. 521), under the Act of June 4, 1897, supra, was incorporated a provision broad enough

> to cover all selections of unsurveyed land under any Act of Congress in which the only requirement as to description was that the land should be designated according to the description by which it would be known when surveyed, if that be practicable. This rule was applied by the Land Department to all unsurveyed lands until the adoption of the regulations of Nov. 3, 1909."

As we have heretofore seen, the Act of June 4, 1897, was a general statute and entitled to liberal construction as contradistinguished from a private Act such as that of March 2, 1899.

In an opinion submitted by Assistant Attorney General, now Mr. Justice, Van Deventer, to the Secty. of the Interior (28 L. D. 312), the following quotation from the decision of the Department in the case of F. A. Hyde and Joseph William Belden (28 L. D. 284), was quoted approvingly:

> "By the establishment of these reservations many claimants and owners of land within the reservation boundaries were placed in a state of greater or less isolation from market and business centers, and from church, school, and social advantages, and the value of their property for residence and other purposes was thereby impaired. The withdrawal from settlement and other disposition of the surrounding public land precluded such persons from obtaining the advantages consequent upon the continuing and increasing settlement which was anticipated when their claims were initiated or their title acquired. In consequence they were clamorous for relief from Congress. Strenous efforts were made to have

the more recent reservations revoked *in toto.* Instead, Congress granted the measure of relief contained in the Act of 1897."

The history of this Act therefore is very different from that of March 2, 1899, as we have already seen. In the latter case there was certainly no clamor from the settlers on the land for the Act, and if there had been, and they had expected a fair deal they would have been disappointed, for the Act discriminates against them and permits them to select *only* surveyed land in lieu of their holdings, while the Railroad Company is permitted to select *unsurveyed,* as well as surveyed land.

This was followed in the Daniels case, supra, both of which cases were referred to by the Circuit Court of Appeals in support of its decision, notwithstanding the fact that there was theretofore no Circular under the Act of March 2, 1899, and the further fact that this Circular of Mar. 3, 1909 *was made retroactive by its specific terms.* It provides:

> To remedy the confusion and uncertainty arising from applications and selections for and filings and locations upon unsurveyed public lands, you will *hereafter reject* any such application, selection, filing or location, under whatsoever law permitted, unless it conforms to the following rules.

The first rule requires "a description of the land by metes and bounds, with courses, distances, and reference to monuments by which the location of the tract on the ground can be readily and accurately ascertained. The monuments may be of iron, or stone or of substantial posts well planted in the ground, or of trees or of natural objects of a permanent nature, etc., etc."

The second rule required in addition an approximate description by Section, Township and Range.

The third rule requires the claimant within 30 days after notice of filing of plats to adjust the claims to the public surveys, and the fourth rule requires posting in a conspicuous place on the land as described in rule one.

The only reason given for not holding the whole of this Circular to be retroactive, as required by its specific terms, is, as stated in the Hanson case, because:

> "It appeared that the practice of allowing selections by the railway company as these selections were made had been of such long standing and such uniform practice that it would be unfair, if not illegal, to give retroactive effect to such regulations."

Why either unfair or illegal? Certainly no more unfair to the Railway Company than to individual settlers. Moreover, no Circular nor decision showing such practice ever existed was, nor could be, produced. The question had never been raised by contest. Not *"illegal,"* for no one would claim any vested right was acquired by the selection, and there is no rule against making it retroactive in such case.

But, to us, the most amazing thing about the decision in the Daniels case is the following statement:

> "Not only have descriptions of unsurveyed land in terms of a future survey been recognized in Departmental practice, but, as has been stated, *such descriptions are required by the regulations now in force* as an essential part of the description in all applications for unsurveyed land. In-

deed in the instructions of May 9, 1899, (28 L. D. 251), under the Act of June 4, 1897 supra, was incorporated a provision broad enough to cover all selections of unsurveyed land under any Act of Congress in which the only requirement as to descriptions was that the land should be *designated according to the description by which it would be known when surveyed, if that be practicable.*"

In the first place the statute in controversy does not require that the land should be "designated according to the description by which it would be known when surveyed," but on the contrary requires that it shall be designated "with a reasonable degree of certainty," a very different proposition.

Again, the Circular of May 9, 1899, had been distinctly held by the Department (37 L. D. 135), to not be applicable to this Act. In that case it was said:

> "The State seeks to apply the same rule to selections under the Act in question that is applied to selections made under the Act of June 4, 1897, and June 6, 1900. The instructions issued under said acts were not intended to govern selections made under other acts. Comstolk v. N. P. Ry. Co. 34 L. D. 88."

In the Comstolk case cited, the Department referring to the Act of 1899, held the Circular of July 7, 1902, (31 L. D. 372), limiting selections under Act of June 4, 1897, to surveyed land did not apply to it for the reason that:

> "The latter is a special Act which dedicated and set apart a portion of the land in the Pacific Forest Reserve, etc."

But still more astonishing and misleading is the statement that "such descriptions are required by the regulations now in force as an essential part of the description in all applications for unsurveyed land."

What gives this statement the appearance of an apparent effort to mislead is its close connection with the statement that the Circular of May 9, 1899, contains a provision broad enough to cover all selections of unsurveyed land, leaving the impression that the regulations now in force simply follow and approve that method of describing unsurveyed land; when, as we have seen, a most thorough metes and bounds and natural object description, with iron, stone, or wooden posts or trees for marking corners is required by the retroactive regulations of Nov. 3, 1909 (38 L. D. 287), which is followed by this regulation *mentioned* to the effect that *in addition* to this elaborate accurate, description in fact, there shall be also an approximate description by section, township and range. There is no hesitation in marking this part of the regulation retroactive. This could hardly be more misleading. It is thus seen, the Department refuses to make that part of the Circular which requires a description in fact and which would constitute notice and a protection to settlers, retroactive, but undertakes to bolster up the contention that the description in terms of a future survey *alone* is sufficient by referring to this additional requirement, thereby making that part of the Circular retroactive, leaving out the first and essential requirement, as well as the requirement that notice shall be given which is required by the fourth rule to be posted on the land as described—not in terms of future survey—but the metes and bounds description under the first rule. But, even, this crumb of comfort for the Railway Company shows that it was not deemed practicable in all cases to thus describe land. We need not ask why, because both the Trial Court and the Circuit

Court of Appeals have held that only a description adjoining or in the immediate vicinity, (the definition of which is equivalent to adjoining) an established survey, is an intelligible one and hence practicable.

Again, the Department in the Daniels case failed to call attention to the fact that this Cir. of May 9 had been superceded by one dated December 18, 1899, upon the same subject (29 L. D. 391). This Circular distinctly revoked the Circular of May 9, 1899 and substituted the Circular of Dec. 18, 1899 for it. A foot note to the Circular of Dec. 18, 1899, refers to the Circular of June 30, 1897, 24 L. D. 589, to paragraph 14 to 18 inclusive. An examination of paragraph 17 of this Circular is as follows:

> "In case a settler on an unsurveyed tract within a forest reserve desires to make a change of settlement to land outside of the reservation and receive credit for previous residence he should file his applications provided for in paragraph 15, including the affidavit as to residence therein required, and describing his unsurveyed claim with sufficient accuracy to enable the local land office to approximately determine its location."

However, as we think we have demonstrated these Circular under acts requiring liberal construction are not applicable and have been used by the Department only to the extent to which they seem to hold that a selection in terms of a future survey is possible in some cases, but realizing that it is only the exception, they provide for a metes and bounds description where not practicable. And, while quoting from such provisions of a Circular applicable to the Act of 1897, as might tend to support this bad practice, the Department fails and refuses to

apply that part of it which requires notice to be given of selections of unsurveyed lands. See also as to instructions of Dec. 18, 1899 (29 L. D. 391—31 L. D. 251.)

It also ignores the instructions of Secretary Smith to the commission in the classification of this identical land under the Act of 1895.

VII

THE ACT OF JULY 1, 1898.

But the most remarkable theory advanced by the Department in the Daniels case in support of an always bad and long ago abandoned supposed practice of designating unsurveyed land in terms of a future survey is, that referring to the Act of July 1, 1898 as a Congressional approval of this method. It is said:

> "Attention has heretofore been directed to the Act of July 1, 1898, in which Congress required that a selection of unsurveyed land by the Railway Company should be of "odd numbered sections to be identified by the survey when made." It is a fair inference that Congress in passing this law was familiar with the practice of the Department in permitting locations and selections under such description and advisedly ratified and applied that practice to selections under the Act. Had such a description as the one involved in this proceeding left any element of reasonable

certainty, in the judgment of Congress, no such requirement as to the description of selected unsurveyed land would have been placed in the Act of 1898."

It is probably due to our obtuseness of mind that we are totally unable to grasp the force of this position. The provision in the Act of 1898, quoted, confines the railroad company to selections of land in *odd numbered sections*, to be identified by the survey, when made. The force and effect and the only force and effect of this provision is first, as it was a part of the adjustment of the grant giving the odd numbered sections to the Company, Congress confined the Railroad selections in lieu of settlers claims to odd numbered sections. What else does it do? It provides these odd numbered sections must be identified by the survey when made. How else could they be identified and at what other time? We have insisted and still insist that the odd numbered sections could not be identified in any way until the Government survey which view is in harmony with the decision of this Court in U. S. v. Montana Lumber Company, 196 U. S. 573 and cases there cited. Suppose all of the provision except the words limiting the company to odd numbered sections had been left out. Would it have changed the meaning in the slightest? Certainly not. The land would have been designated precisely as prescribed and could be designated in no other way.

The language of the Act of 1899, does not follow this in the remotest degree, but on the contrary provides that the company in making its selection must "designate the land with a reasonable degree of certainty." No language having any such meaning is found in the Act of 1898.

In the case of U. S. v. Burr, 159 U. S., 78, this Court referring to the Tariff Law of 1894, speaking through Mr. Chief Justice Fuller, held:

> "In these circumstances we are entitled to avail ourselves of such light as the history of the steps taken in the enactment of the law, as disclosed by the legislative records, may afford."

The Secretary in the Daniels case adds:

> "The requirement in the Act of 1899 that the land selected be described with a reasonable degree of certainty must be construed in the light of the Act of 1898 which was, in fact, a determination by the law making branch of the Government that a description in terms of a future survey was sufficient and valid."

Again we are at a loss to see what relation there is between a requirement that land shall be designated with a reasonable degree of certainty and that in the Act of 1898 confining the company to odd numbered sections to be designated by the survey when made. In point of fact the language of the Act of 1899 as to unsurveyed land was copied literally from the Act of August 5, 1892, which was a remedial statute held by the Department to have been enacted wholly in the interest of settlers holding patents or entries upon land under the rulings of the Department as to the terminus of the railroad which rulings were overruled by this Court. It is clear therefore that Congress in enacting the Act of March 2, 1899, could not have had in view the Act of 1898.

The legislative history of these two acts is that as hereinbefore set out the bills for the Act of March 2, 1899, in precisely the language in which they finally passed and were approved were introduced in the 54th Congress, passed both Houses and was signed by the Speaker March 3, 1897, but was not approved by the

President. This was more than a year before the Act of 1898 made its first appearance through the Senate Committee on Appropriations as a rider upon an appropriation bill. The absurdity of the position of the Department therefore, must be apparent to everyone. Unfortunately the Circuit Court of Appeals relying upon the unjustifiable statements of the Department in the decision in the Daniels case, referred to this Act of 1898 as having some bearing in the case.

The amazing fact, however, is that the Department was given an opportunity in the motion for rehearing in the Daniels case to correct this, together with other erroneous statements hereinbefore set out, but in its wisdom, saw proper to ignore the urgency of the motion.

If, however, the Department is right in saying in the Daniels case that the Act of July 1, 1898, was a "Congressional indorsement of the method of description in terms of a future survey," why was it that the Department years before this decision characterized the practice as a bad one, which never should have been allowed and which was abandoned years ago and a metes and bounds description required.

We might also ask what right the Department would have to thus designate a description approved by Congress and abandon it as a bad practice? Were it not for the high regard we have for the officials thus holding we would be constrained to say that its absurdity is apparent. As it is, we can only say that zeal has outrun judgment, in our opinion. Moreover,the decision admits not only that it was a bad practice long since abandoned, but that of itself it was not a definite description, but depended upon its proximity to established

lines of Government surveys. In other words, it was not a definite or certain description, but in some rare instances might be made definite if the land was in the "vicinity" of surveyed lines.

CONCLUSION.

In conclusion, we beg to submit that the Northern Pacific Railway Company could not make a valid selection of land under the Act of March 2, 1899, in its own name without the action of Congress which made the grant to the Railroad Company upon terms and conditions which were accepted by that Company, the privileges and valuable rights given by the grant could be exercised by the grantee only.

Second, But, if it should be held that this view is erroneous then we submit that as the land was classified as mineral under the Act of 1895, which classification was approved by the Secretary of the Interior prior to the date of the selection, and which *by the terms of the statute became final* in the absence of protest, except for fraud, could not be selected either by the Railroad Company or anyone on its behalf without first having this approval of the Secretary set aside for fraud, which was not undertaken and is not claimed.

Third, In addition to this no land could be subject to selection under the Act unless it was affirmatively and positively "classified" by the Surveyor at time of actual survey by the Government, as non-mineral, and no failure to state whether the land was mineral or non-mineral could be held, under the strict limitations of the statute to be such classification, and for this reason it was not subject to selection.

Fourth, If we are right in either of these propositions it is unnecessary to consider the lack of a description of the land in terms of "reasonable certainty" required by the Act, for whether the description be sufficient or insufficient, if the land was not subject to selection by the Company its claim must fail. We do not believe that we can express with as much force and accuracy as did First Asst. Secretary Adams in his letter to the Commissioner, supra, the grounds of the insufficiency of the description of lands in terms of a future survey. We therefore at the expense of repetition quote as follows:

> To describe a tract of land as what will be, when surveyed, a certain parcel of the public domain is certainly indefinite. It means nothing except that in such case the selector thereby expects to initiate a preference claim to land somewhere without giving notice to other persons who may wish to make an appropriation under the same or other laws, and who, after he has gone upon the public domain, in pursuance of such lawful design and marked his claim and perhaps cultivated and improved it, may be awakened years thereafter to find that it is lost to him by reason of a prior appropriation of which he had no notice either in law or in fact. The proposition, therefore, seems to lead to a preposterous result, and in my opinion cannot be entertained."

The learned Judge who delivered the opinion of the Circuit Court of Appeals referred to this description required by the statute as follows:

> "An exact description is therefore unimportant, but the applicant must designate the tract designed to be selected with a reasonable degree of certainty. The filing of the first list is

> in a sense preliminary to obtaining the patent. It initiates the right, and not as much particularity and exactness is ordinarily required as to where final stages are to be observed in clearing up and completing the transaction."

We may be permitted to ask what is the purpose of this requirement of a description with reasonable certainty? The Court says it is not the basis for patent. We would infer from the decision that it was only a matter between the selector and the Government and that any kind of a description was sufficient prior to the filing of a new list. Here again we find a complete ignoring of the rights of intending settlers upon this unsurveyed land. It certainly was not the intention of Congress that settlers should settle at their peril at any time before survey and the filing of a new list, which, in many cases, as in the one at bar, was a number of years after the selection and the filing of the new list to which the learned Court refers as conforming to the established surveys which is always precisely the same as that given in the selection list, for the reason that there is *no description* at all of any kind, either of certainty or the contrary until the new list is filed and there is never any *conformity* because none is possible under such a selection and this makes the language of the statute an absurdity, which the Courts never hold. If not for the purpose of being sufficiently definite to give notice to intending settlers of the claim of the company on the ground, then it utterly fails of the purpose intended by Congress and might as well never have been filed. As between the Government and the selector it is wholly unnecessary, for unless to be protected against the acquisition of rights by settlers, there is no possible reason for making selections until the plats of survey are filed. It is impossible to ignore, evade, or get away from the clearly expressed purpose of Congress that

this designation of the land with a reasonable degree of certainty, language required in no other Act, except one wholly for the benefit of settlers, as construed by the Department, means *that it shall constitute notice to intending settlers. They* must give notice of *their* claims in such a way that the Railway Company could not be mistaken as to the lands claimed by them. Are they, or are they not, entitled to the same consideration at the hands of the Railway Company when Congress specifically provides for such a description as would be notice to them. Asst. Secretary Adams, in his letter to the Commissioner, stated that he was "profoundly impressed with the thought that while they permitted and authorized the initiation of claims to unsurveyed lands, they all (Acts of Congress) evidently contemplate that such lands should be identified in some appropriate and effective way. There is nothing in any of these acts justifying another conclusion."

The whole question resolves itself into this proposition: Shall the Railway Company by filing a List in the local office under a description which does not then exist, and may never exist, be permitted to prevent the settlement of the public unsurveyed lands until such time as the Government may determine to survey them and thus prevent the settlement of the country except where the settlers are willing at their peril to guess at where the particular unknown and unknownable number may fall on the ground, when surveyed, if it is ever done; and then risk the forfeiture to the Railway Company, which has not expended a dollar, of the fruits of their labor for many years, and such improvements as they have been able to make. In this case, according to West's testimony (Record p. 29), they are worth $2,800. It may well be said, as stated by First Asst. Secretary Adams, "the proposition seems to lead to a preposterous result." And we might add that it is so fraught with

such injustice and unfair treatment of the pioneer settlers the men who settle, build up, and develop the Country, that no Court whether of law or equity, should tolerate it unless forced to do so by the unambiguous positive requirements of a statute.

Respectfully submitted,

S. M. STOCKSLAGER,

A. H. KENYON,

SEABURY MERRITT,

Attorneys for West.

APPENDIX "A".

Survey of Sec. 20, T. 44 N., R. 3 E., Idaho.

Washington, March 31, 1916.

Stockslager, Heard & Stockslager,

Attys. at Law, McGill Bldg.,

Washington, D. C.

My dear Sirs:

I am in receipt of your letter dated March 23, 1916, in which you request information from the records of this office in reference to the survey of Sec. 20, T. 44 N., R. 3 E., B. M., Idaho.

In reply you are informed that in the survey of this township in 1903, the records of this office show the following conditions:

1. Prior to the survey of T. 44 N., R. 3 E., Sec. 20 could not have been readily located unless allowance was made for the theoretical convergency of the meridians and the location of the corners on the 8th standard parallel, which would govern the corners to the north up to a closing on the 9th standard parallel.

2. In making the survey of this township, the survey was not initiated from any point on any line in T. 45 N.

3. The survey of T. 44 N., R. 3 E., was initiated from the accepted corner Ts. 43 and 44 N., Rs, 2 and 3 E., which was the southwest corner of T. 44 N., R. 3 E., and this corner was therefore the governing corner for the survey of this township according to the provisions of the manual of surveying instructions in such cases, and his instructions in consequence thereof, provided that he should commence at this corner. The township to the south above the 8th standard parallel had not yet been surveyed, and this was the most practical corner under the circumstances from which to initiate the survey of this township.

4. Beginning his survey at such initial point the deputy surveyor first ran the south boundary of T. 44 N., R. 3 E., due east 477.67 chs. the exact theoritical length, allowing for the earth's convergency. The southeast corner of the township was then established, and a line therefrom, run due north setting the corners on the east boundary of the township at regular intervals and at 474.96 chs., a closing corner established at its intersection with the 9th standard parallel on the south boundary of Sec. 32, T. 45 N., R. 3, 16.80 chs. west of the corner of Rs. 3 and 4E., T. 45 N.

The south boundary of Sec. 31 was made 77.67 chs., and the south boundaries of Secs. 32, 33, 34, 35 and 36, were made 80 chs. each according to the instructions and the provisions of the manual in such cases. The survey of the subdivisional section lines were then proceeded with in the regular manner, initiating each line on the section corners on the south boundary, the east tier of sections being first surveyed then proceeding with the survey of the successive tiers to the west. The corners governing the survey of the boundaries of Sec. 20, were the corners of Secs. 32 and 33, and of Secs. 31 and 32,

from which corners the lines were run north 0o 4'w., and north 0° 5'W., respectively 160 chs., where the southeast and southwest corners of Sec. 20 were established.

5. From the initial point the survey of the township proceeded in the regular manner as provided in the manual under such circumstances.

6. T. 44 N., R. 3 E., contains 22693.87 acres according to the survey all sections on the north and west boundaries being fractional, therefore not containing precisely 36 full sections which would be 23040 acres, the deficiency being 346.13 acres.

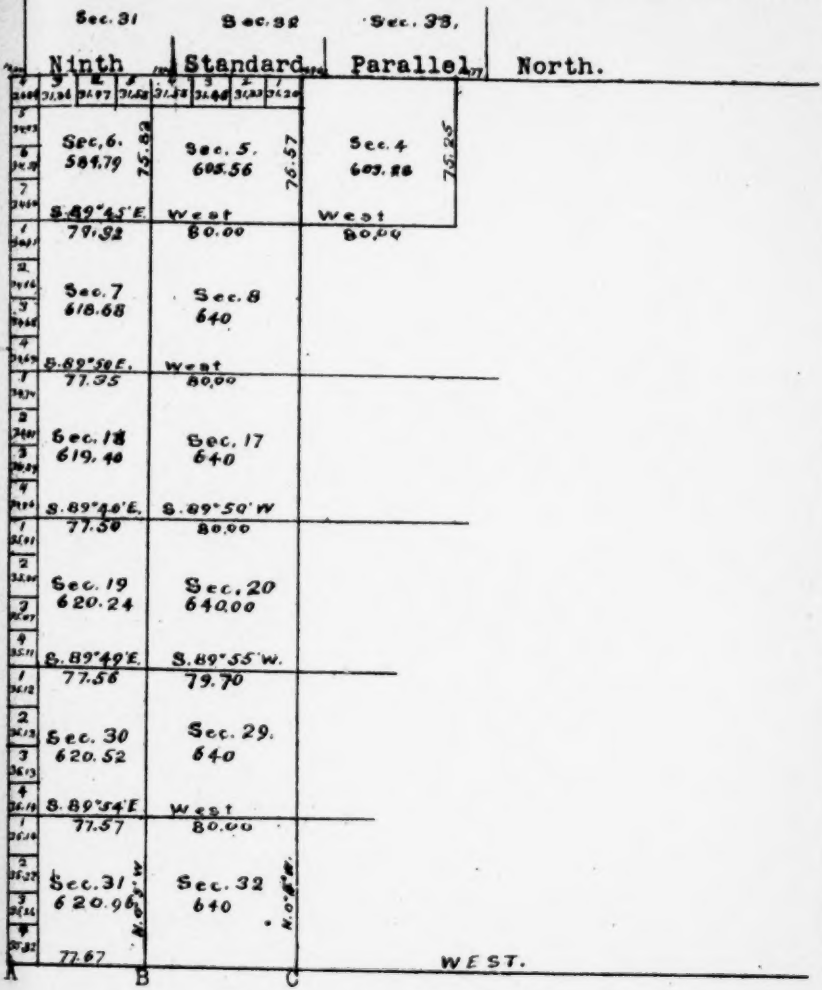
Very respectfully,

C. M. BRUCE,

Assistant Commissioner.

3-28-JSS

DIAGRAM OF A PORTION OF T. 44 N. R 3 E. B. M. IDAHO.



A Corner from which the survey of T. 44 N. R. 3 E. was initated.

C Initial corner from which the lines were run for the location of the corners on the E. bdy. Sec. 20.

B Corner from which the lines were started which govern the location of the corners on the S. W. and N. boundaries of Sec. 20.

SUPREME COURT, U. S.
FILED
MAR 6 1917
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 276.

ANDREW WEST,

APPELLANT,

vs.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY,

APPELLEES.

BRIEF FOR APPELLEES

CHARLES W. BUNN,
CHARLES DONNELLY,
JAMES B. KERR,
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Counsel for Appellees.

INDEX.

Pages.

STATEMENT 1-5

ARGUMENT 6-61

APPENDIX (Opinion in Miles v. Northern Pacific Railway Co.) .. App. i-iv

ARGUMENT ON SPECIFIC POINTS.

I. Was the Northern Pacific Railway Company entitled to select the land in suit as successor to the rights of the Northern Pacific Railroad Company? 6-13

(a) The question is not open for consideration in this case 6-11, 15

(b) The question is not in issue under the pleadings .. 28

(c) Discussion of question on the merits 11-13

II. Was the land in suit of such character as to be subject to selection by the Railway Company by reason of its classification as mineral or non-mineral 14-28

(a) The question is not open for consideration in this case 15-16, 23

(b) The question is not in issue under the pleadings .. 28

(c) The record does not support appellant's contention that the land was classified as mineral under the act of February 26, 1895 19-23

(d) Classification of the land in suit, which was in an even-numbered section, was not authorized by the act of February 26, 1895 16-18

(e) If the land had in fact been classified as mineral under the act of 1895, and if such classification could be held authorized by the act, this classification would be fatal to appellant 18-19

(f) Classification as mineral under the act of 1895 is not an obstacle to selection of land so classified under the act of March 2, 1899 22-23

(g) The burden of proof is upon the party attacking the patent title to show affirmatively the existence of a state of facts under which the award of patent to the patentee is erroneous in law (neither fraud nor mistake being claimed); and this burden is not sustained in the present case, even under the theory of law upon which appellant relies 24-26

(h) The record shows that the land in suit was affirmatively classified as non-mineral at the time of survey, as provided in the act of 1899 26-27

(i) Even on appellant's theory as to the nature of the surveyor's return in this case, it must be held that such return amounted to an affirmative non-mineral classification 27-28

Pages.

III. Was the description by which the land was designated in the Railway Company's selection list a sufficient compliance with the act of March 2, 1899?..... 28-45

(a) History of Departmental regulations and procedure 28-32

(b) Discussion of the question..... 32-45

IV-a. As the Railway Company's selection was made in exact compliance with the rule of procedure established by departmental regulations, practice and rulings, it cannot now be overthrown by a retroactive decision that the rule thus established by the Department was erroneous; since the ground of attack upon which appellant chiefly relies involves a question of practice and procedure merely..... 46-60

IV-b. The nature of the act of March 2, 1899, is such that it is entitled to a reasonable, as opposed to a strict, construction 60-61

LIST OF CASES CITED.

Pages.

Balderston v. Brady, 107 Pac. 493, 498..... 38

Barden v. Northern Pacific Railroad Co., 154 U. S. 288..... 14

Bedal v. St. Paul, Minneapolis & Manitoba Railway Co., 29 L. D. 254 27

Beley v. Naphtaly, 169 U. S. 353..... 9

Bird Timber Co. v. Snohomish County, 81 Wash. 416; 143 Pac. 433 44

Bird Timber Co. v. Snohomish County, 88 Wash. 90; 152 Pac. 689 44

Bohall v. Dilla, 114 U. S. 47, 51..... 25

Burfenning v. Chicago, etc., Ry. Co., 163 U. S. 321-323..... 33

Burke v. Southern Pacific Railroad Co., 234 U. S. 669, 679..... 60

Candido v. Fargo, 7 L. D. 75..... 57

Central Pacific Railroad Co. v. Nevada, 162 U. S. 512..... 44

Commonwealth v. Gregory, 89 S. W. Rep. 168..... 52

Cudney v. Flannery, 1 L. D. 165..... 55

Daniels v. Northern Pacific Railway Co., 43 L. D. 281 27, 30, 41, 42, App. ii

Davenport v. Northern Pacific Railway Co., 32 L. D. 28..... 27

Delany v. Northern Pacific Railway Co., 45 L. D. 6.....13, 30, 42

Dickey, Ella I., 22 L. D. 351..... 58

Dole, David B., 3 L. D. 214..... 56

Ferguson v. Northern Pacific Railway Co., 33 L. D. 634, 636..... 3, 8

Floyd, Isham, 5 L. D. 531..... 57

Frost, Edwin F., 21 L. D. 38..... 58

Fuss, Henry W., 5 L. D. 167..... 55

Germania Iron Co. v. James, (C. C. A. 8th Cir.) 89 Fed. 811..... 47

Groeck v. Southern Pacific R. Co., 102 Fed. (C. C. A. 9th Cir.) 32, 34 34

Pages.

Haas v. Henkel, 216 U. S. 462, 480..... 52
Haas v. Henkel, 166 Fed. 621, 627..... 58
Hanson v. Northern Pacific Railway Co., 38 L. D. 491..... 30
Harrison v. Commonwealth, 83 Ky. 162..... 52
Heath v. Wallace, 138 U. S. 573, 582..... 18, 33
Hewitt v. Schultz, 180 U. S. 139, 156, 163..... 17
Howe v. Parker, (C. C. A. 8th Cir.) 190 Fed. 738, 757..... 49
Hyde, F. A., 28 L. D. 284..... 12, 29
Hyde, F. A., et al., 40 L. D. 284.....31, 41, 42, 44

Instructions, 9 L. D. 86..... 56
Instructions, 20 L. D. 571..... 17
Interstate Commerce Com. v. D. L. & W. R. R. Co., 220 U. S. 235. 33
Interstate Commerce Com. v. Illinois Central R. R. Co., 215 U. S. 452 33
Interstate Commerce Com. v. U. P. R. R. Co., 222 U. S. 541.... 33

James v. Germania Iron Co., 107 Fed. 597..... 48
Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391..... 57
Johnson v. Riddle, 240 U. S. 467, 474..... 25
Johnson v. Towsley, 13 Wall. 72..... 33

Kimpton, Adnah M., 45 L. D. 110..... 22
Kirk v. Brooks, 24 L. D. 448..... 58
Kopperud, J. H., 10 L. D. 93..... 57

Labathe v. Robords, 25 L. D. 207..... 58
La Roque v. United States, 239 U. S. 62, 64..... 17
Lee v. Johnson, 116 U. S. 48, 50..... 25
Leonard v. Lennox, (C. C. A. 8th Cir.) 181 Fed. 760, 762..... 25
Leonard, Mary R., 9 L. D. 189.....53, 54, 55
Lindback, John M., 9 L. D. 284..... 57
Logan v. Davis, 233 U. S. 613, 627..... 17
Louisiana v. Garfield, 211 U. S. 70, 76..... 17
Lynch v. United States, (C. C. A. 9th Cir.) 138 Fed. 535, 542-543 21

McCormick v. Hayes, 159 U. S. 332..... 33
Marquez v. Frisbie, 101 U. S. 473, 475..... 25
Masterson, C. P., 7 L. D. 577..... 57
Maxwell Land-Grant Case, 121 U. S. 325, 379, 381..... 25
Menotti v. Dillon, 167 U. S. 703, 721..... 61
Miles v. Northern Pacific Railway Co. (Unreported, see appendix) 22, 27, 30, 42
Milne v. Ellsworth, 3 L. D. 213..... 57
Miner v. Mariott, 2 L. D. 709..... 54
M. K. & T. Ry. Co. v. Kansas, Pacific Ry. Co., 97 U. S. 497..... 9
Montana Railway Co. v. Warren, 137 U. S. 348, 351..... 13

Northern Pacific Railway Co. v. Boyd, 228 U. S. 482..... 8, 11
Northern Pacific Railway Co. v. State of Idaho, 37 L. D. 68, 69..14, 17, 22
Northern Pacific Railway Co. v. United States, 176 Fed. 706.... 8

Pages.

Opinions Attorney General, vol. 21, p. 486 8
Opinions Attorney General, vol. 25, p. 401 8
Oro Placer Claim, 11 L. D. 457 58
Oswald, Jacob, 11 L. D. 155 57
Quinby v. Conlan, 104 U. S. 420, 425 25

Rand v. United States, 38 Fed. 665 50
Rogers v. Godwin, 2 Mass. 477 52
Ross v. Day, 232 U. S. 110, 116 25
Ross v. Stewart, 227 U. S. 530, 535 25
Rough Rider and Other Lode Claims, 42 L. D. 584 58

St. Paul, Minneapolis & Manitoba Railway Co., 34 L. D. 211 27
Smelting Co. v. Kemp, 104 U. S. 636, 640, 647 ..... 25, 33
Sparks v. Pierce, 115 U. S. 408, 413 25
Spencer, James, 6 L. D. 217 57
State of California, 22 L. D. 428 58
State of Idaho v. Northern Pacific Railway Co., 37 L. D. 70 17
State of Idaho v. Northern Pacific Railway Co., 37 L. D. 135, 138 12, 14, 17, 19, 22, App. iii

State v. Kelsey, 44 N. J. L. 1, 22 52
Steel v. Smelting Co., 106 U. S. 447, 450-454 ..... 25, 33
Stuart v. Laird, 1 Cranch, 299 52

Thompson, William, 8 L. D. 104 57
Tustin v. Adams, 22 L. D. 266, 270 58

United States v. Alabama, etc., Railroad Co., 142 U. S. 615, 621 .. 18, 51
United States v. Birdsall, 233 U. S. 223, 231 ..... 52, 58
United States v. Hammers, 221 U. S. 220, 228 ..... 17, 53
United States v. MacDaniel, 7 Pet. 1, 14 .....49, 50, 51, 52, 58, 59
United States v. Moore, 95 U. S. 760, 763 18
United States v. Newport News, etc., Co., 178 Fed. 194 51

Walker v. United States, 139 Fed. 409, 416 50
Webster v. Luther, 163 U. S. 331 9
West v. E. Rutledge Timber Co. (D. C.) 210 Fed. 189 4
West v. E. Rutledge Timber Co. (C. C. A. 9th Cir.) 221 Fed. 30 .. 4
Whitcomb v. White, 214 U. S. 15 25
Wisconsin Central R. Co. v. Price County, 133 U. S. 496 34
Wright v. Roseberry, 121 U. S. 488 33

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

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BRIEF FOR APPELLEES

STATEMENT.

Within the place limits of the grant of lands to the Northern Pacific Railroad Company (13 Stat. 365) were included certain lands now forming part of the Mt. Ranier National Park; and when, on March 2, 1899, Congress passed the act creating that park (30 Stat. 993) it was deemed necessary to obtain a relinquishment of title thus granted. Accordingly, by sections three and four it was provided:

"Sec. 3. That upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any state into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States: *Provided*, That any settlers on lands in said national park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.

"Sec. 4. That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the perioid of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely con-

> form with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

The proposition thus made was accepted, and the Northern Pacific Rail*road* Company, the Northern Pacific Rail*way* Company and the Central Trust Company of New York executed and filed with the Secretary of the Interior a deed releasing and conveying to the United States all claim to lands within the park thus created. (Tr. 68.) This relinquishment was finally approved and accepted by the Secretary of the Interior on July 26, 1899, in an order or decision which, after reciting the relinquishment and its acceptance, proceeds to declare:

> "The Northern Pacific Rail*way* Company, successor to the Northern Pacific Rail*road* Company, is therefore entitled, in accordance with the provisions of Section 3 of said Act * * * to select an equal quantity of non-mineral public lands * * * to the extent of the land so relinquished."
>
> See Ferguson v. Northern Pacific Railway Co., 33 L. D. 634, 636.

June 21, 1901, the Northern Pacific Railway Company filed in the United States Land Office at Coeur d'Alene, Idaho, its selection list No. 61, by which, proceeding under section four quoted above, it selected, in lieu of lands released to the United States, certain unsurveyed lands, describing them as "*tracts of land, which, when surveyed, will be described as follows.*" There follows a description by section, township and range of the tracts selected, among them being section 20, township 44 north, range 3 east. (Tr. 49-54.)

May 15, 1903, the appellant went upon the southeast quarter of section 20, township 44 north, range 3 east, and

except for occasional intermissions, resided upon it thereafter. (Tr. 28.) At that time this township was still unsurveyed, but the south line of the adjacent township, 45 north, range 3 east, had been surveyed some two years before. (Tr. 34, 82; Appellant's Brief, p. 2.) Township 44, range 3, was surveyed in the field in the first week of July, 1903, some six weeks after appellant first went upon the land. (Tr. 31.)

July 17, 1905, the official plat of survey of township 44 north, range 3 east, was filed in the land office at Coeur d'Alene, and on that day appellant tendered his application to enter, under the homestead law, the southeast quarter of Section 20, township 44 north, range 3 east. His application was rejected on the ground that the land had been selected by the Northern Pacific Railway Company. (Tr. 3, 12, 40, 41.)

July 31, 1905, the Northern Pacific Railway Company filed in the local land office a new selection list, describing the land in question according to the survey. (Tr. 54-57.) October 13, 1910, patent was issued to the Railway Company. (Tr. 67-70.)

In this suit appellant asks a decree declaring that he is the owner of the land which he sought to enter, and that the Railway Company and its grantee, the Timber Company, hold their title to it in trust for him. The lower court found against him and ordered his bill dismissed. (Tr. 71-87, 210 Fed. 189.) The Circuit Court of Appeals affirmed the decree unanimously. (Tr. 102-113, 221 Fed. 30.)

The issues presented by this appeal are stated by counsel for appellant (Brief p. 14) to be the three following:

"1st. The grant having been made to the Northern Pacific *Railroad* Company, a great corporation created by Act of Congress, and to which the Government had theretofore granted approximately forty-three million acres of land, a part of which was to be reconveyed, could a selection be made by the Northern Pacific *Railway* Company, a separate and distinct corporation organized under the laws of Wisconsin, upon the ground that because of its purchase of the property and franchises of the *Railroad* Company under foreclosure sale, it was its successor in interest?

2nd. The lands having been classified under the Act of February 26, 1895, as mineral, which classification was approved by the Secretary of the Interior March 26, 1901, a date prior to the selection by the company, and the surveyor having failed to make any classification in terms as non-mineral, was the land subject to selection by the company under the Act of Mar. 2, 1899?

3rd. If the Railway Company was authorized to make the selection, and if the land was subject to the selection at the date it was made, was the description given of the land selected, in terms of a future survey, a compliance with the requirement of the statute that it should be described with *a reasonable degree of certainty,* so as to bar the rights of settlers in good faith without actual or constructive notice?"

We shall discuss these three questions in the order in which they are stated.

ARGUMENT.

I.

Section 3 of the act of March 2, 1899, provides, as the court will have observed, "that upon execution and filing with the Secretary of the Interior by the Northern Pacific Rail*road* Company of proper deed, etc., * * * said company is hereby authorized to select, etc." When this act was passed, the Northern Pacific Rail*way* Company had succeeded to all of the property of the Northern Pacific Rail*road* Company, including the land of which the government was seeking to obtain title and for which it was proposing by that act to exchange other lands. Accordingly, the Northern Pacific Railroad Company, the Northern Pacific Railway Company and the Central Trust Company all joined in releasing to the United States the lands lying within the park area (Tr. 68); and the Northern Pacific Railway Company, having filed with the Secretary of the Interior evidence that it was the lawful successor of the Northern Pacific Railroad Company, (Tr. 69) was allowed to select and has ever since been allowed to select the lands given in exchange for the lands relinquished.

Before the trial court, appellant contended that because the "grant" was to the Northern Pacific Rail*road* Company, the Northern Pacific Railway Company was not qualified to select the land and that there was no evidence that the latter company was the successor of the former. That this court may have a clear apprehension of the point there made, we quote from the record (Tr. 75-78) exactly what the trial court said regarding it:

"The first objection is that, the grant being to the Northern Pacific Railroad Company, and the Railway Company not being named in the granting act, it was not qualified to select the land or to receive a patent therefor. This is one of the questions which it was necessary for the Interior Department to decide and which it did decide. The patent contains an express recital to the effect that upon evidence adduced it was found that the Railway Company was 'the lawful successor in interest' of the Railroad Company. In its administration of the public land laws, it is undoubtedly within the jurisdiction of the Interior Department to pass upon questions of succession, and insofar as such determination involves issues of fact, or issues of mixed law and fact, within the familiar principle already adverted to, it is final and conclusive. But it is said that, contrary to the patent recital, the record shows that there was no evidence upon the point before the Department. Granting that we have before us a transcript of all the proceedings taken in the matter of the plaintiff's application to enter and receive a patent, we cannot assume that we have the entire record in the matter of the Railway Company's application for patent upon its lieu selections, and the presumption must therefore be indulged that the recital is true, in point of fact. It is, however, argued that as a matter of law it would be held that the Railway Company could not be an assignee under, or otherwise profit by, the Act, for the grant is to the Railroad Company, and is not assignable. No decision is cited in support of the proposition, nor does plaintiff assign any reason, and apparently none is imaginable, why Congress should have intended to deny the right of assignment, or to confine the operation of the grant to the Railroad Company to the exclusion of its successors in interest. The grant was in no sense a gratuity. The Government contemplated the creation of the Mount Rainier National Park, and to carry out the purpose it was deemed desirable, if not absolutely necessary, to procure title to certain lands embraced in the land grant made to the Railroad Company by the act of July 2, 1864, (13 Stat. 365). For these it was willing to exchange other lands, which it owned, and by the act it proposed to make such exchange.

The case is very different from one where the government is promoting a public enterprise by the donation of lands of great value, in which case it may not unreasonably be concerned in the character of the donee, and its qualifications and capacity to carry the enterprise to success. Here, upon the other hand, it was in need of certain privately-owned lands, to carry out its own purposes, and in securing title thereto, surely it was not greatly concerned in the question to whom the consideration should be paid or what was done with it after it was paid. In the light of conditions as they actually existed, and the manifest purpose of Congress to extinguish all private claims to the base lands required for the proposed park, we can do little more than speculate as to the reason why the Railroad Company rather than the Railway Company was named as grantee. It is unreasonable to infer that Congress intended thus to place itself upon record as opposed to the view that the Railway Company had succeeded to the property rights and franchises of the Railroad Company, for but a short time prior thereto, by a proviso in the act of July 1, 1898, (30 Stat. 621; 6 Fed. Stat. Ann. 457), it had expressly disclaimed any purpose to decide or prejudice this question, which was recognized as being of judicial rather than of legislative cognizance. At the present time, the question appears to have been the subject of investigation, and it has been repeatedly held that as a result of foreclosure proceedings consummated prior to the passage of the act of 1899, the Railway Company acquired all the property rights and franchises of the Railroad Company. 21 *Ops. Atty. Gen.* 486; 25 *Ops. Atty. Gen.* 401; *Ferguson v. Northern Pacific*, 33 L. D. 634. See also *Northern Pacific Ry. Co. v. United States*, 176 Fed. 706 *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482; 35 Sup. Ct. Rep. 554. It therefore appears that the construction contended for by the plaintiff would render the act nugatory. For if this conclusion is correct, and admittedly it is not open to review upon the record here, it turns out that at the time the act of 1899 was passed, the Railroad Company was not possessed of the lands desired by the Government, but that its rights thereto had passed to the Railway Com-

pany, and unless we hold either that by inadvertence the Rail*road* Company was named while the Rail*way* Company was intended, or that the privilege conferred upon the Railroad Company is assignable, plainly the act becomes wholly ineffectual for any purpose. It is a cardinal principle that of two possible constructions of a statute that one should be adopted which will give to it effect, in preference to that which would defeat the legislative intent. *M. K. & T. Ry. Co. v. Kansas, Pacific Ry. Co.*, 97 U. S. 497. As a general rule of law, restraint upon the right of alienation is not favored, and such grants are assignable. *Webster v. Luther*, 163 U. S. 331. *Beley v. Naphtaly*, 169 U. S. 353. Accordingly it is held that the Railway Company could, as a matter of law, by assignment become the successor in interest of the Railroad Company to the rights and privileges conferred by the act of 1899, and it having been found as a fact by the Department that it is such successor, the point must be ruled adversely to the plaintiff's contention."

On taking his case to the Circuit Court of Appeals, the appellant, by his assignment of errors, preserved this point (Tr. 89), charging in the third assignment that "the court erred in holding and deciding that the Northern Pacific Railway Company was the successor to or had the right to exercise the rights of the Northern Pacific Railroad Company, which was expressly named in the grant". On presenting his case in that court, however, he abandoned the contention altogether. The "single question" urged by him in that court was the question of the sufficiency of the description in the Railway Company's selection. (Tr. 112.)

On removing the case to this court, appellant, by his assignment of errors, still preserved this point; and although, as stated, he had abandoned it on his presentation of the case to the Court of Appeals, he charges that

court in assignment 1½ (Tr. 116) with having "erred in holding and deciding that the Northern Pacific Railway Company was the successor to or had the right to exercise the rights of the Northern Pacific Railroad Company." But on coming to brief the point, he shifts his ground. He quotes from the opinion of the trial court some of the language which we have quoted above; avers that that court "*evidently misunderstood* the point involved" (Brief, p. 16); asserts that the real question is "whether the new grant of 1899 to that company, *which then had no existence*, could be taken by the Railway Company as a substituted grantee;" and then, without the slightest regard to the limitations of the record, proceeds to argue in support of the entirely new proposition "that at the date of the act of March 2, 1899, the Northern Pacific Railroad Company, chartered by Act of Congress in 1864, had no existence and hence there was no grantee to take and the grant is *therefore* absolutely void." (Brief p. 20.) The question thus stated becomes a question, not of successorship, but of the validity of the "grant" and whether it did not fail altogether for want of a "grantee."

But this question is not in the case. No such question was suggested to either of the courts below; nor is there a word in the evidence or in the assignments of error which affords any basis for its suggestion here. For evidence of the fact that in 1875 there was a foreclosure of the mortgage given by the Northern Pacific Railroad Company, counsel for appellant do not refer to the record. They refer to "Smalley's History of the Northern Pacific Railway Co." (Brief, p. 18.) If we are to assume that they mean to refer to the "History of the Northern Pacific Railroad," by Eugene V. Smalley, published by G. P.

Putnam's Sons in 1883, then we say, first, that this is not an authoritative publication which the court will notice judicially for the purpose of getting information of what took place in a foreclosure proceeding; and, second, that the slightest examination of the book itself and of the proceedings through which the Northern Pacific Railway Company got its title, shows counsel's account of the facts and of the effect of those proceedings to be grossly inaccurate. Authentic evidence of what was done in a foreclosure suit can be obtained only from the record of the suit. This court had occasion in *Northern Pacific Railway Company v. Boyd,* 228 U. S. 482, to consider, upon an adequate record, the steps by which the Railway Company acquired its title; and it has given a full account of them in the report of that case. If counsel were unwilling to examine the records in the foreclosure suits to ascertain what was done, they might have learned from an examination of the report in the *Boyd* case (p. 491) that the Northern Pacific Railroad Company was *not* divested of all of its property in 1896; that it continued to exist and to own the granted lands east of the Missouri River until months after the act of March 2, 1899, was passed ;and that it was its existence as late as 1912 which gave to this court jurisdiction of that case.

Moreover the argument that there was a failure of the "grant" for want of a "grantee", like most of what is said in the brief, assumes that the act of March 2, 1899, was an ordinary grant of lands to a railroad company; but it was not. It was primarily an offer to exchange lands. The government desired to embrace within the limits of a national park certain lands within the limits of the grant of 1864 to the Northern Pacific Railroad Company. That

grant had been fully earned and the title was certainly outstanding *somewhere*. Supposing it to be in the Northern Pacific Railroad Company, the government, by the act of March 2, 1899, made an offer, which might be accepted or rejected, to exchange other lands for the lands granted in 1864. The same offer was made by the same act to settlers within the park limits.* The following language quoted by the trial court (Tr. 85-86) from the decision of Assistant Secretary Pierce in *State of Idaho v. Northern Pacific Railway Company*, 37 L. D. 135, 138, undoubtedly gives to the act the right construction:

> "It was deemed necessary to the accomplishment of its purpose that the United States should own the land placed in reservation by the act (original land grant act). A voluntary conveyance by the Railway Company was the most feasible method of reacquiring title to the granted land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The act is contractual in character, and terms and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer."

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* Though it is not a matter of consequence, it should be noted that counsel persistently misrepresent the effect of the act of March 2, 1899, as regards the right which it gave to settlers. They say (Brief p. 10) that "while the Railroad Company is given the right to select from the surveyed and **unsurveyed** public lands of the United States, the settler upon the lands sought to be set aside as the Mt. Ranier National Park is granted in lieu of his right, the right to select **only** surveyed lands." They repeat the statement at p. 59. The statement is utterly untrue. The settler is given the same right to select unsurveyed lands that is possessed by the Railway Company. The act provides specifically that "any settlers on lands in said National Park may relinquish their rights thereto and take other public lands in lieu thereof **to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.**" The conditions "provided by law for forest reserves" are those named in the Act of June 4, 1897, (30 Stat. 11, 36); and that act allowed the selection by the settler of land either surveyed or unsurveyed. **F. A. Hyde**, 28 L. D. 284.

Of the offer thus made an acceptance was filed by what was certainly the Northern Pacific Railroad Company *de facto,* by its successor the Northern Pacific Railway Company, and by the trustee in the Railway Company's mortgage; and these three companies joined in a deed of reconveyance to the United States. No one denies that the effect of this deed was to give to the United States something which it did not possess before, namely, title to the lands within the park limits granted by the act of 1864. The government itself is satisfied with its title; and certainly it cannot, while retaining that title, deny to those from whom it was obtained the lands offered in exchange.

The fallacy of appellant's position and the intolerable consequences which would result from the rule for which he argues are forcibly and concisely explained in a recent decision of the Secretary of the Interior. *Delany v. Northern Pacific Railway Company,* 45 L. D. 6.

Finally, even if the evidence and the assignments of error afforded a basis for presenting this contention, the failure to present it to the court below (Tr. 112) deprives appellant of his right to present it here. This court will consider only whether the Circuit Court of Appeals erred; and certainly it will not reverse that court's decree on a question which it was never asked to consider. *Montana Railway Company v. Warren,* 137 U. S. 348, 351.

II.

After the decision of this court in *Barden v. Northern Pacific Railroad Company*, 154 U. S. 288, and probably because of a suggestion contained in that decision, Congress passed the act of February 26, 1895 (28 Stat. 683), providing for the examination and classification of lands within the limits of the grant of 1864 to the Northern Pacific Railroad Company. Pursuant to that act the Secretary of the Interior, on June 25, 1895, issued instructions to the Board of Land Commissioners appointed under it to "examine, for the purpose of classification, *odd-numbered* sections within the grant *only*." (Tr. 64, 67; 20 L. D. 571; *State of Idaho v. Northern Pacific Railway Company*, 37 L. D. 135, 136; *Northern Pacific Railway Company v. State of Idaho*, 37 L. D. 68, 69). Appellant asserts that notwithstanding these instructions, the Board of Land Commissioners classified the land involved in this case as mineral land, and that this classification received departmental approval. We shall demonstrate that the record does not support this contention. And if it were true that the land in suit had been so classified under the act of 1895, it is nevertheless true that it is in fact non-mineral. Everyone concedes this (Tr. 78); appellant insists on it (Tr. 40); indeed, his case depends upon it, for his rights rest on the homestead law and under that law he could take title only to non-mineral lands. But he now asserts that though the land is non-mineral in fact, and though its classification as mineral was erroneous, and though the action of the Commissioners in making any classification

of it was opposed to departmental instructions; nevertheless that classification is final under the act of February 26, 1895; and as the Mt. Ranier act allows the selection only of non-mineral land, the Department's action in awarding it to the Railway Company was unauthorized. There are several sufficient answers to this contention.

1. No such contention was made in either of the courts below. In the District Court appellant's position was that the land had not been classified at all, and that it was not subject to selection by the Railway Company because not affirmatively classified as non-mineral at the time of survey. Referring to appellant's contention in this regard, the District Judge said (Tr. 78):

> "Precisely stated, it is that the land was not expressly classified as non-mineral by the surveyors in the field; *it is not claimed that it was returned as mineral*, nor is there now any question that it was in fact non-mineral."

The only assignment of error presented to the Court of Appeals which in any way touches the point is as follows (Tr. 88, 89):

> "The court erred in holding and deciding that the real estate in controversy *had been classified as land non-mineral in character* as provided in the act of March 2, 1899, under which the defendants claimed."

Manifestly that assignment of error does not raise or remotely suggest the proposition now argued. Moreover, that assignment was definitely abandoned by appellant in the Court of Appeals. It was not mentioned or touched upon in any manner whatsoever in his brief; and at the oral argument, appellant's counsel expressly disclaimed reliance on the point, stating frankly that he believed the

record did not present the question. As we have already pointed out, and as the Court of Appeals states in its opinion (Tr. 112), the "single question" presented to that court was the question of the sufficiency of the description.

What is said above of the waiver of the successorship point by failure to present it to the court below, applies with still greater force to this classification point; especially in the form in which it is now urged. The proposition that the land in suit was affirmatively classified as mineral under the act of 1895 is not only a mere afterthought, which was not suggested in either of the courts below, but it is directly inconsistent with the position taken by appellant at the trial, where he claimed that the land had not been classified at all.

2. The land in suit is part of an even-numbered section. The act of February 26, 1895, was designed to secure classification only of the lands which the Railroad Company might claim. By the terms of its granting acts the Railroad Company was limited to land in odd-numbered sections. The acts of June 4, 1897, July 1, 1898, and March 2, 1899, under which the Railroad Company might acquire land in even-numbered sections had not yet been passed. Had Congress been providing for a general examination and classification of lands in Montana and Idaho, whether or not the Railroad Company might claim them under its grant, it would hardly have restricted the activities of the examiners to the land grant limits. The Department was undoubtedly right in its instructions limiting the *classification* to the odd-numbered sections, although permitting the *examina-*

tion of adjacent sections for geological conditions which might influence the classification of the odd sections. The act of 1895 expressly provides that the Department shall make rules and regulations governing the action of the Commissioners. The regulations referred to involve a construction of the act. And the construction so adopted has steadfastly been adhered to by the Department for more than twenty years.

Instructions, 20 L. D. 571.

State of Idaho v. Northern Pacific Railway Co., 37 L. D. 135.

Northern Pacific Railway Co. v. State of Idaho, 37 L. D. 68.

State of Idaho v. Northern Pacific Railway Co., 37 L. D. 70.

Regulations, 44 L. D. 285, 297.

This brings the case within the familiar rule that where an act is in any degree doubtful or ambiguous, in language or intent, the construction placed upon it in contemporary administration, by the Department charged with the duty of executing it, is entitled to great weight; and where such construction has been continuously recognized and applied over a series of years, it should be deemed conclusive—even though such construction may be of doubtful correctness when considered as an original proposition.

La Roque v. United States, 239 U. S. 62, 64.

Logan v. Davis, 233 U. S. 613, 627.

United States v. Hammers, 221 U. S. 220, 228.

Louisiana v. Garfield, 211 U. S. 70, 76.

Hewitt v. Schultz, 180 U. S. 139, 156, 163.

United States v. Alabama, etc., Railroad, 142 U. S. 615, 621.
Heath v. Wallace, 138 U. S. 573, 582.
United States v. Moore, 95 U. S. 760, 763.

3. If appellant's contention that the act of 1895 authorizes the classification of even as well as odd-numbered sections—or that a classification by the Commissioners of even sections, although unauthorized, is final and conclusive—is sound, it is fatal to his own case.

If the classification of an even section as mineral is final, it must be final as to everyone. No other conclusion is consistent with the theory that Congress intended, by the act of 1895, to authorize the classification of even sections. It is absurd to suppose that Congress intended to provide for an expensive examination and classification of even sections, which should be effective only against the Railroad Company, when the Railroad Company's grant was limited to odd sections. Therefore, if it can be held that the classification of even sections is authorized by the act of 1895, and is final or conclusive for any purpose, there is no escape from the conclusion that such classification is final and conclusive as to every one, and not as to the Railroad Company alone.

The law under which appellant claims gives him no right to the land unless it is nonmineral. And if the land was classified as mineral, as appellant asserts, and such classification is final as against the Railroad Company, it is likewise final against appellant, establishing the character of the land as against his claim. In a suit like this, plaintiff cannot prevail upon a showing of error in the

award of the land to a patentee. He must also show, as the foundation of his case, that he is himself entitled to the land as against the Government. See authorities cited in paragraph 6 below. So if appellant's contention as to the classification of the land is sound, it cuts the ground from under his own feet and deprives him of the equity upon which his case depends.

4. We have proceeded thus far under the implied concession that it appears, as appellant asserts, that the land in suit was in fact classified as mineral under the act of 1895. But such is not the case.

The sole support for appellant's contention is a recital in an opinion by the Commissioner of the General Land Office (Tr. 62-66) which deals with a large quantity of lands and a number of individual claims, including that of appellant. Some of these lands were in odd-numbered sections, which admittedly were classified as mineral under the act of 1895. Other lands, like that in suit, were in even-numbered sections. The recital in question does not specifically refer to the land claimed by appellant; and we submit that it is neither definite nor conclusive. The decision was not a final decision under the practice of the Department. It was in fact appealed from, and the decision of the Secretary on appeal, which was duly put in evidence at the trial (Tr. 67) is found at 37 L. D. 135. In that decision, the Secretary says:

> "The *odd-numbered sections* were classified as mineral under the act of February 26, 1895. * * * The returns made at the time of actual government survey classify the same tracts as non-mineral. * * * Said list number 61 covers parts of even-numbered

> sections only, while a portion of the tracts described in lists number 63 and 65 are also parts of even-numbered sections. As such sections were not subject to classification under the act of February 26, 1895, supra, the first objection of the State cannot be considered as applying to those tracts."

And there is nothing in the Secretary's decision from which it can be inferred that Section 20 was ever classified as mineral.

The full record of the proceedings in the Department was not put in evidence. Such record of those proceedings as was introduced at the trial was obviously fragmentary and incomplete. There is a familiar and well settled rule (to which we shall refer more particularly hereafter) that a patent for land amounts to an adjudication of all facts essential to sustain the right of the patentee to the land; that where the patent title is questioned in a suit of this chraacter, the burden is upon the party attacking it to controvert by competent and conclusive evidence every theory of fact upon which the patent might be sustained; and that no inferences or presumptions adverse to the patent title will be indulged in. Under this rule and upon such a record it will be presumed, if necessary to sustain the patent, that if all the proceedings in the Department were before the court it would be found either that Section 20 was not classified under the act of 1895, or that the unauthorized classification of this even-numbered section had been corrected and set aside.

Be that as it may, the recital on which appellant relies, when considered in connection with the decision of the Secretary on appeal, and in the light of the rule referred to, is equivocal at best; and in view of the incomplete state

of the record, and of the evidence and admission about to be mentioned, it is quite without probative force.

Appellant called as a witness the Register of the United States Land Office at Coeur d'Alene, in whose district the land in suit is situated, and examined him on the question whether that land had been classified as mineral or non-mineral. Testifying from the records of his office, the Register declared that Section 20 had *not* been classified under the act of 1895—that the odd-numbered sections in that township had been classified as mineral under that act, but that the even-numbered sections had not. It may be said that the evidence thus elicited related to the records of the Coeur d'Alene Land Office only. But the act of 1895 expressly requires (Section 6) that "all plats and records of the *local* and general *land offices* shall be made to conform to such classification." Under the rule of law above referred to, the court is not permitted to indulge in the presumption that the officers of the Department failed in the duty imposed upon them by the express terms of the act of 1895, to cause the classification of lands thereunder to be entered on the records of the local land office; nor in the face of the showing that those records disclose that the section here involved was not so classified, although odd-numbered sections in the same township were, to presume that a classification had in fact been made. See *Lynch v. United States* (C. C. A. 9th Circuit), 138 Federal 535, 542-543, where these provisions of the act of 1895 were under consideration.

And while the witness was under cross-examination, appellant's counsel made the following deliberate admission: "*We admit now that the records do not show that there was a classification of Section* 20." (Tr. 37.)

We therefore submit that it cannot be held upon this record, even if the point were open to appellant, that the land in suit was ever classified as mineral under the act of 1895. So that even if the proposition upon which appellant relies were sound in law, it is not involved in the present case.

5. But if it be conceded that the act of 1895 authorized the classification of even-numbered sections, that the land in suit was duly classified as mineral under that act, and that the question is open to appellant in this court, nevertheless appellant's argument is without avail.

The Department has uniformly held that a mineral classification under the act of 1895, even of an odd-numbered section within the grant limits, is not an obstacle to its subsequent selection under the act of March 2, 1899. The question was first presented nearly ten years ago, and the rule then announced has since been consistently followed and applied.

State of Idaho v. Northern Pacific Railway Co., 37 L. D. 135.

Northern Pacific Railway Co. v. State of Idaho, 37 L. D. 68.

Adnah M. Kimpton, 45 L. D. 110.

Miles v. Northern Pacific Railway Co., (Opinion on denial of rehearing by Secretary, February 16, 1915. Printed as an appendix to this brief.)

And the ruling of the Department was right. No other conclusion could properly have been reached in view of the provisions of the act of March 2, 1899. That act was

passed four years after the act of February 26, 1895. It was passed for a special purpose—the acquisition by the Government of lands in the Mount Ranier National Park to which the Northern Pacific Railway Company had a vested title. As consideration for the relinquishment of those lands, the act conferred upon the Northern Pacific the right to select other lands, within or without the limits of its original grant. And that right of selection was, by the express terms of the act, extended to "non-mineral public lands, so classified as non-mineral *at the time of actual government survey, which has been or shall be made.*" This language plainly excludes the idea that the right of selection thus granted can be made to depend upon a classification of such lands under a prior special act, where the land selected is admittedly non-mineral in fact, and was duly classified as non-mineral "at the time of actual government survey" as provided in the act of 1899.

6. In the District Court, appellant argued that it did not appear that the land in suit was affirmatively "classified as non-mineral at the time of actual government survey" as required by the act of March 2, 1899, and this point only was covered by his assignments of error to the Court of Appeals. But, as we have indicated, that assignment of error was definitely abandoned by appellant in the Court of Appeals; and the court below was not asked to pass, and did not pass, upon the question. And we submit that, for the reasons stated in paragraph 1 of this subdivision of our brief, the question is not open on the present appeal. Indeed, appellant does not appear to rely upon it here, although he refers to it in an indirect and

half-hearted way. But the question may readily be disposed of on the merits.

First let us refer to certain principles of law, firmly established by numerous decisions of this court, which should be regarded in the consideration of this question. These principles may be stated as follows: A patent for land is not only a conveyance; it is also the judgment of a quasi-judicial tribunal to which questions relating to the disposition of public lands are confided, that the patentee is entitled to the land. Where, as here, the land covered by the patent is land which was within the jurisdiction of the Departmnt, the patent is impervious to collateral attack. It cannot be questioned in any form of action at law, but only by suit in equity by the Government to set aside the patent, or by an individual claimant to have the patentee declared trustee of the legal title for his benefit. In such a suit the patent is conclusive upon all questions of *fact*, or *mixed law and fact*, actually decided by the Department or necessarily involved or implied in the determination that the patentee is entitled to the land. Where the suit is by an individual claimant, it is essential for him to show that he is himself entitled to the land as against the Government; so that under the law, rightly administered, a patent would be issued to him. Where the patent title is questioned in a suit of this character, the burden is upon the party attacking it to controvert, by competent and conclusive evidence, every theory of fact upon which the patent might be sustained. No inferences or presumptions will be indulged adverse to the patent title. There must be a clear and unequivocal showing of superior right in the plaintiff; and this conclusion cannot be made to depend upon inferences, or

upon evidence susceptible of a construction which would sustain a judgment for the patentee. The patent imports an adjudication by the Department of the existence of every fact necessary to entitle the patentee to the land; and this adjudication cannot be overthrown save by a clear, conclusive and unequivocal showing of the non-existence of such facts, or of the existence of facts creating a superior right in the plaintiff; and in either case the burden is upon the plaintiff and must be sustained by him at all points. And where there is any conflict or uncertainty in the showing, or where conflicting inferences may be drawn from the evidence, although undisputed, the burden is not sustained and the patent will control.

Smelting Co. v. Kemp, 104 U. S. 636, 640, 647.
Maxwell Land Grant Case, 121 U. S. 325, 379, 381.
Lee v. Johnson, 116 U. S. 48, 50.
Steel v. Smelting Co., 106 U. S. 447, 450-454.
Bohall v. Dilla, 114 U. S. 47, 51.
Sparks v. Pierce, 115 U. S. 408, 413.
Marquez v. Frisbie, 101 U. S. 473, 475.
Quinby v. Conlan, 104 U. S. 420, 425.
Whitcomb v. White, 214 U. S. 15.
Ross v. Day, 232 U. S. 110, 116.
Ross v. Stewart, 227 U. S. 530, 535.
Johnson v. Riddle, 240 U. S. 467, 474.
Leonard v. Lennox, (C. C. A. 8th Cir.), 181 Fed. 760, 762; Opinion by Mr. Justice Van Devanter.

Now, the patent under which appellees hold, amounts to an adjudication, among other things, that the land selected was of the character subject to selection under the act of 1899; that is, that it is non-mineral land, duly classified

as non-mineral within the intent of the statute. Upon the record in this case, it must be held that this determination involves a question of fact, or at most of mixed law and fact, upon which the action of the Department is final and conclusive.

7. It seems to be appellant's theory that it has been made to appear that the surveyor's return with respect to the character of the land was not sufficiently definite to amount to the affirmative non-mineral classification which he asserts was essential. But the record furnishes no support for that theory. No evidence was introduced by appellant having any tendency to overthrow the determination that the land was of the requisite character—that it was land classified as non-mineral as required by the act—which is embodied in the patent itself. On the contrary, the evidence affirmatively shows that the land was in fact classified as non-mineral at the time of survey. This appears from the decision of the Secretary of the Interior, dealing with the claims of appellant and others, on appeal, which is in evidence here. (Tr. 67; 37 L. D. 135.) The recital in the decision of the Commissioner of the General Land Office, to which appellant refers (Tr. 65), if otherwise of any force, is overcome by this decision of the Secretary. We have pointed out that the record of the proceedings in the Department introduced by appellant is fragmentary and incomplete, and aside from the effect which must be given the finding of the Secretary, the incompleteness of the evidence as to those proceedings brings into play the rule referred to in the last preceding paragraph.

The trial court held specifically (Tr. 76, 79) that the record was incomplete and the evidence insufficient to support the inference upon which appellant's theory concerning classification of the land was based. And in the argument before the Court of Appeals, appellant's counsel (having already, in his brief, abandoned the point and the assignment of error based thereon) expressly conceded this ruling to be correct. And we submit that an examination of the record will demonstrate that the trial court was right and the concession of counsel well advised.

8. But if appellant's present contention as to the nature of the surveyor's return were supported by the record, and if the point were open on this appeal, nevertheless it must still be held that the return amounted to an affirmative non-mineral classification within the meaning of the act of 1899. This question is so well covered by the thoughtful and scholarly opinion of the learned trial judge (Tr. 78-80) and by the reasoning of the authorities cited below that further argument seems unnecessary.

Davenport v. Northern Pacific Railway Company, 32 L. D. 28.

Bedal v. St. Paul, Minneapolis & Manitoba Railway Company 29 L. D. 254.

St. Paul, Minneapolis & Manitoba Railway Company, 34 L. D. 211.

Daniels v. Northern Pacific Railway Company, 43 L. D. 381.

Miles v. Northern Pacific Railway Company. (Unpublished, see Appendix to this brief.)

The rule already adverted to that a contemporaneous and long continued construction by the Department should be given controlling weight, applies with peculiar force in this connection, where the construction deals with the effect to be given to returns of surveyors made under departmental practice and regulations.

9. In conclusion, it may be pointed out that there is another all-sufficient reason why the question whether this land was or was not classified as to its mineral or non-mineral character, either by the Commissioners appointed under the act of 1895 or "at the time of the government survey thereof", is not before the court in this case; and that is that no such question is in issue under the pleadings. (Tr. 1-25.) And the same thing is true of the so-called "successorship" point.

III.

Appellant's main reliance here (as it was his sole reliance in the court below, and his main reliance in the trial court) is upon the proposition that as the lands were unsurveyed when selected by the Railway Company June 21, 1901, the description of them, according to the section, township and range by which they would be known when surveyed, was not such a description as the act required.

Some account of the departmental regulations governing selections of unsurveyed lands is necesasry to a clear understanding of the question thus raised. The Mt.

Ranier act is not the only one authorizing such selections. They are authorized as well by the act of June 4, 1897, (30 Stat. 11, 36) dealing with forest reservations, and by the act of July 1, 1898, (30 Stat. 597, 620) dealing with the Northern Pacific grant; so that before the enactment of the Mt. Ranier act, the department was met with the necessity of determining how unsurveyed lands selected under those acts should be described and identified.

Accordingly, it promulgated rules governing such selections. The act of July 1, 1898, provided in terms that "all selections of unsurveyed lands *shall be of odd-numbered sections to be identified by the survey when made.*" The departmental regulations governing selections under this act are dated February 14, 1899, and are to be found in 28 L. D. 103,108. They provide:

> "Selections of unsurveyed lands by the railroad claimant are confined to odd-numbered sections or legal subdivisions therein, 'to be identified by the survey when made;' *that is, the selection must be of the whole or some legal subdivision of a designated odd-numbered section, so that the public survey when made will give identity to the land selected.* Selections of unsurveyed lands by an individual claimant must be designated *according to the description by which they will be known when surveyed*, if that be practicable, or, if not practicable, by giving with as much precision as possible the locality of the tract with reference to known landmarks, so as to admit of its being readily identified when the lines of survey come to be extended."

The act of June 4, 1897, is not so explicit as to how unsurveyed lands when selected shall be identified. Indeed it was not until April 14, 1899, when the Department decided on review the first case of *F. A. Hyde*, 28 L. D. 284, that unsurveyed lands were determined to be selectable

under that act. This having been determined in that case, however, the Department promulgated regulations May 9, 1899, (28 L. D. 521) which provided:

> "Every selection of unsurveyed land *must designate the same according to the description by which it will be known when surveyed, if that be practicable*, or, if not practicable, must give, with as much precision as possible, the locality of the tract with reference to known landmarks, so as to admit of its being identified when the lines of public survey come to be extended."

Though the Mt. Ranier Act was passed March 2, 1899, it was not until July, 1899, after its relinquishment of its granted lands within Mt. Ranier Park, that the Railway Company was in a position to make selections under it; and at that time, as we have seen, all of the departmental regulations relating to the selection of unsurveyed lands required that such lands, when selected, should be described and identified according to the description by which they would be known when surveyed. Though framed with specific reference to the Acts of June 4, 1897, and July 1, 1898, they were by their terms generally applicable to any selection of unsurveyed lands, and it was not thought necessary, on the passage of the Act of March 2, 1899, to issue additional regulations. Those already in effect were taken as covering *any* selection of unsurveyed lands.

Hanson v. Northern Pacific Railway Co., 38 L. D. 491.

Daniels v. Northern Pacific Railway Co., 43 L. D. 381.

Delaney v. Northern Pacific Railway Company, 45 L. D. 6.

Miles v. Northern Pacific Railway Company. (Unpublished; see copy in Appendix to this brief.)

Compliance with those regulations was accepted by the Department as a full compliance with the requirements of the law until February 21, 1908. On that date the Department issued a circular (36 L. D., 278), which was by its terms applicable to all forms of "scrips, warrants, certificates, soldiers' additional homestead rights and lieu selections" of whatever kind; and which provided for the posting on the land of notice of the selection, application, or entry. This regulation, of course, was intended to apply to selections under the Mt. Ranier Act, as well as to selections under the acts of 1897 and 1898. But it was not intended to have—and indeed it could not have been given—a retroactive operation. This is manifest from the language of the circular itself, which although issued February 21, 1908, provided that "the following requirements will govern *on and after April* 1, 1908." Indeed, in the very decision upon which appellant places his main reliance—the case of *F. A. Hyde, et. al.*, 40 L. D. 284—it is expressly held that the circular of February 21, 1908, has no retroactive effect.

November 3, 1909, a circular was issued (38 L. D. 287) carrying a new regulation applicable to all cases of selections, filings, and locations upon unsurveyed lands, in which, for the first time, it is required that such selections, etc., must describe the land "by metes and bounds, with courses, distances and reference to monuments," etc., and that the boundaries of the selected land shall be marked out upon the ground. This regulation further provides that "the approximate description of the land by section, township and range, as it will appear when surveyed, must be furnished; or if this cannot be done, an affidavit must be filed setting forth a valid reason therefor." But it was

specifically held in *Hanson v. Northern Pacific*, 38 L. D. 491, that this regulation could not be given retroactive effect.

With this summary of the departmental regulations in mind the court will observe that when, in June, 1901, the railway company selected the lands in question the kind of description which it should make of them was not a matter of choice. *It was controlled by the regulations of February* 14, 1899, *and May* 9, 1899. Wherever it was possible to describe land according to the description by which it would be known when surveyed the railway company was not merely authorized but *required* to do so. It is obvious, therefore, that to sustain appellant's contention this court must hold *as matter of law* that that description has not a "reasonable degree of certainty," which was not merely accepted by the Department as being reasonably certain in *fact*, but was *prescribed* by the Department, *sua sponte*, as answering most nearly to the law's requirements.

The courts below declined unanimously to hold this, and clearly they were right in doing so. The question whether a given description identifies lands with "a reasonable degree of certainty" is essentially one of fact. It is a question which, from the very necessities of the case, must, in the first instance, be decided by the Land Department. Considering the nature and character of its duties, the Department may be supposed to know, better perhaps than any one else, whether a given description is reasonably certain; and there is a special propriety in committing the question to it for determination. It is doubtless true that the discretion thus vested in that Department may not be arbitrarily exercised. The De-

partment may not say that that is a reasonably certain designation which cannot be taken to designate anything at all. But within reasonable limits, it is plain that the decision by one administrative department whether a given description is reasonably certain is as much a decision of a question of fact as is the decision by another administrative department whether a given rate or practice is reasonable and whether such questions are decided by the Land Department or by the Interstate Commerce Commission, the decision in the absence of fraud or arbitrary action is not reviewable by the courts. *Interstate Commerce Commission v. Illinois Central R. R.*, 215 U. S. 452; *Interstate Commerce Commission v. D. L. & W. R. R. Co.*, 220 U. S. 235; *Interstate Commerce Commission v. U. P. R. R. Co.*, 222 U. S. 541.

As said by this court in *Burfenning v. Chicago, Etc., Ry. Co.*, 163 U. S. 321-323:

> "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to re-litigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. *Johnson v. Towsley*, 13 Wall. 72; *Smelting Company v. Kemp*, 104 U. S. 636; *Steel v. Smelting Company*, 106 U. S. 447; *Wright v. Roseberry*, 121 U. S. 488; *Heath v. Wallace*, 138 U. S. 573; *McCormick v. Hayes*, 159 U. S. 332."

In *Wisconsin Central R. Co. v. Price County*, 133 U. S. 496, the Court, speaking of the function of the Secretary with respect to the issuance of patents for indemnity land, said:

> "His action in that matter was not ministerial but judicial. He was required to determine in the first place whether there were any deficiencies in the lands granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed."

The case of *Groeck v. Southern Pacific R. Co.*, (C. C. A. 9th Cir.) 102 Fed. 32, 34, is directly in point. That was a suit by the Southern Pacific Railroad Company to declare Groeck trustee of a patent title granted to him under a pre-emption entry, the Railroad Company claiming under the land grant act of July 27, 1866. The land had been selected by the Railroad Company as indemnity, and its selection had been rejected because in conflict with the pre-emption claim of Groeck. The court said:

> "Considering the language of the grant, it must be held that indemnity lands are selected under the direction of the secretary of the interior whenever the grantee thereof complies with the directions which the secretary has published for the regulation of such selection. The secretary was not clothed with the power to defeat the grant of the indemnity lands, or by capricious regulation to affect the title which was intended to be conveyed. Nor has the secretary in this instance made any regulation which has injuriously affected the right of the grantee. *He had the power to prescribe in advance the method of making such*

selection, and, having prescribed it, and his directions having been followed, it cannot be said that the lands were not selected in the manner required by the granting act."

A determination that the description in question designated the land with a reasonable degree of certainty will hardly be called an arbitrary one. To call it this would be to accuse Congress itself of arbitrary action. The act of July 1, 1898, provides in terms that "all selections of unsurveyed lands shall be of odd-numbered sections to be identified by the survey when made." (30 Stat. 620.) The possibility of identifying lands according to the description by which they will be known when surveyed is here distinctly recognized; and surely no court can say that that description is under one law so inadequate as to be arbitrary, which under another law was recognized by Congress itself as being so appropriate that it was specifically required.

Nor is it difficult for anyone, acquainted as this court is with the legislation affecting public lands in the Western states, to understand why that form of selection should have been specified and required. Speaking generally, it is, perhaps, the very best method of designating or describing unsurveyed lands that could be devised. Situations may of course be imagined where lands are so remote from any public survey that this form of designation would give little information as to the locality in which they lie, and as said by the trial court (Tr. 82), it might well be held that as to lands so situated such a designation would not be reasonably certain. But in the present state of public surveys such situations are not numerous—certainly not along the lines of the land grant railroads; and for many

years settlements on unsurveyed lands within the boundaries of the grants to those railroads have been made with direct reference to the description by which they should be known when surveyed. The grants to the railroad companies included all odd-numbered sections, *whether surveyed or unsurveyed*, which at date of definite location were free from any claims or other rights; and the settler knew when initiating a settlement that if the land settled upon proved to be an odd-numbered section, he must relinquish it to the railroad company. Knowing this, he has made his settlement with direct reference to the public survey.

To say that when the adjacent township lines have been run, it is impossible or even difficult to determine with reasonable certainty where a given section will lie, is to fly in the face of facts with which most residents of the Western states are familiar. As already stated, when, on June 21, 1901, the railway company filed the selection list in question, the southern line of township 45 North, range 3 East had been run. Suppose that, instead of selecting a tract of land "which, when surveyed, will be described as section 20, township 44 North, range 3 East," the railway company's description of the tract thus selected had been as follows: "Commencing at a point distant three miles due south from a point on the south line of township 45 north, range 3 east, one mile east of the southwest corner of said township; thence due east one mile; thence due south one mile; thence due west one mile; thence due north one mile to the point of commencement." Here we have a "metes and bounds" description, and as such it would satisfy appellant's objection. Yet can anyone doubt that the description actually used by the railway company

means the same thing? Or can it be doubted that anyone interested in the lands would gather that meaning from it? And is it not apparent that in marking the boundaries of the land involved in this suit, the party from whom appellant purchased had himself defined or marked them by exactly that kind of anticipatory identification of them with the official survey which appellant now says was impossible? It appears that the adjoining township (45 north, range 3 east) had been officially surveyed and the corners established; and of course the south line of that township necessarily constituted and was coexistent with the north line of township 44, range 3, in which the land involved in this case is situated. The land in suit is three and one-half miles from this township line. The testimony of the witness who helped mark the lines of appellant's claim is that the south line of the adjoining township having been established, they "carried their lines in from the south line of that township," and "undertook to tie them up to the government lines." (Tr. 34.) It was lines so run that the appellant found blazed upon the land when he went into possession in 1903. (Tr. 28.) Doubtless these blazed lines were not exactly coincident with the official survey lines as finally determined; and it is possible (though less likely), that such a metes and bounds description as we have supposed above would not coincide exactly with the lines of section 20. The corrected list in the one case and the application to make homestead entry in the other would definitely determine the land claimed. But it is clear that the language by which the Railway Company "designated" the land selected was the perfectly definite and intelligible equivalent of the best metes and bounds description that could have been

devised; and it is surely no objection to it that it describes or indicates lines which *must* coincide with the lines of the official survey, instead of lines which might not do so.

What is a "reasonable degree of certainty" within the meaning of the statute? Can it be said that the form of description which the Department for ten years held to be proper and sufficient—which it even made obligatory and exclusive—is so indefinite and uncertain that it does not come within the term.

In *Balderston v. Brady*, 107 Pac. 493, 498, the Supreme Court of Idaho said:

> "The fact, however, that the land was not surveyed could make no difference *where the numbers of the sections were specifically given.* The title to unsurveyed lands may be as readily conveyed as that to surveyed lands. It is a maxim of law that that is certain which is capable of being made certain. 'Id certum est, quod certum reddi potest.' All that remained to be done in order to identify these lands on the ground was to have the survey extended over them. The description in the grant was definite and certain."

The act of 1899 requires only a "reasonable degree" of certainty. The words are not meaningless. Fairly construed, they indicate an intent to allow considerable latitude in the matter of description. Else why say "*reasonable degree*"? The form of description which appellants argue for in these cases calls for *absolute* certainty. But the words of the act are more elastic in their meaning and purpose.

It must be apparent that the requirement of the statute may be satisfied in several different ways. It might be

satisfied, for instance, by a description based upon natural landmarks, water boundaries or artificial monuments, or a combination of these or by a description tied in, by courses and distances, to the established corners of some completed survey. But this is not to say that a description by reference to the survey thereafter to be made does not conform to the definition of a "reasonable degree of certainty."

It should be borne in mind that the question now to be determined is not whether the practice heretofore pursued is the best and wisest that could be devised, but whether it can possibly be held to be permitted by the terms of the act. If under any fair or reasonable interpretation of the statute the form of description sanctioned by the Department can be held to come within the statute, then the selections must be upheld. In short, the present question, viewed in the aspect most favorable to appellant, is merely whether the construction which the Department has put upon the act is *possible or permissible* under the language employed by Congress. For when the Department has interpreted the law, and rights have been acquired on the faith of that interpretation, a reconsideration of the question is somewhat limited in its scope; and it is not enough that the later view may favor a practice different from that formerly established, if the former practice is within any reasonable interpretation of the words of Congress.

The question before the court in this case is not one which has to do with substantive rights granted by the law, but only with the course of *procedure* to be followed in

perfecting rights so granted. The Department construed the statute to require and permit certain steps to be taken. Those steps were taken in good faith by the Railway Company, the party claiming under the act, in exact accordance with the rules laid down by the Department, and in reliance upon the Departmental construction. No one has been misled or prejudiced. Under these circumstances we submit that it is not the duty of the court to resort to refinement of reasoning for the purpose of overthrowing that construction. After all, the question at this late date is not what interpretation the Department ought to put upon the provisions of the act of 1899, if the question were now before it for the first time. The question is whether the construction which the Department did put upon the act in the very beginning, which it steadfastly adhered to in administrative procedure for more than ten years, and which it still consistently adheres to as a matter of construction, is so obviously unreasonable and so contrary to the terms and intent of the statute as to afford no protection to parties proceeding in reliance upon it. Unless the statute is so clear as to leave no doubt as to its meaning, and the interpretation thus placed upon it by the Department is plainly and palpably unreasonable, then that interpretation should not now be departed from to the prejudice of rights acquired upon the faith of it.

We proceed now to notice certain points in appellant's brief.

1. In the court below appellant relied chiefly on the reasoning of Assistant Secretary Adams' opinion in the case of *F. A. Hyde, et al*, 40 L. D. 284. But in their brief to this court, his counsel transfer their allegiance from the decision in the *Hyde* case to a more or less informal unpublished letter from Assistant Secretary Adams to the Commissioner, said to have been written shortly after the *Hyde* case was decided, in which Mr. Adams explains and defends the theory advanced by him in that case. This letter is not in evidence, nor is it reported. And granting that it is all counsel says, we understand that under the departmental practice a communication of this sort is without authoritative force. However, we may concede all appellant claims for the opinion in the *Hyde* case and Assistant Secretary Adams' comment thereon in his subsequent letter to the Commissioner. For in *Daniels v. Northern Pacific*, 43 L. D. 381, the *Hyde* case was expressly overruled and the decision of Judge Dietrich in the present case approved and followed, and it was held unequivocally that a designation of unsurveyed land according to the description by which it will be known when surveyed does identify the land described with a reasonable degree of certainty and is a full compliance with the requirements of the Act of March 2, 1899. And this repudiation of the doctrine of the *Hyde* case carries a like repudiation of the theories of Mr. Adams' letter, in which appellant puts such extraordinary reliance. Moreover, as pointed out in the *Daniels* case, even in the *Hyde* case "it

was unequivocally held that such a description was valid as against the Government."

The opinion in the *Daniels* case shows that the decision is based upon the most painstaking and thorough research and consideration. It has since been adhered to and followed, after repeated reargument of the question, in a large number of decisions; mostly unreported, but including *Delaney v. Northern Pacific Railway Co.*, 45 L. D. 6, and *Miles v. Northern Pacific Railway Co.* (See appendix.) And the *Daniels* case is in line with previous decisions of the Department and with the general course of departmental rulings; while the *Hyde* case is wholly without support in any departmental decision or ruling—save as it may be said to find support in the somewhat informal letter upon which appellant lays so much stress.

2. As already stated, the act of July 1, 1898, (30 Stat. 597, 620) contains a direct recognition by Congress of the sufficiency of a description in terms of future survey; for that act provides specifically for that kind of a description where unsurveyed lands are selected under it. In the courts below, counsel for appellant did not deny this. On the contrary, they not only admitted it, but proceeded to draw from it an argument in their favor. In their brief filed in the Circuit Court of Appeals, after quoting the language of the act of July 1, 1898, they go on to contrast that language with the language of the act of March 2, 1899, and they say:

> "If Congress had intended *to continue* to grant to the Railroad Company the right to make lieu selections by simply filing lieu selection lists, describing the lands according to what they might be when surveyed, it is clear they would have continued the use of the language found in the Act of July 1, 1898, above quoted."

This argument the Circuit Court of Appeals takes up and answers specifically. (Tr. 112.)

As to this point, also, counsel for appellant take, in this court, an entirely new stand. They devote to the discussion of the Act of July 1, 1898, an entire division of their brief (pp. 64-68), and they treat it as an act of which "*the only force and effect*" was to provide that the Railway Company's selections should be restricted to odd-numbered sections (Brief p. 65); they say that "the absurdity of the position of the Department" in ascribing to the act any further or different effect "must be apparent to everyone"; all of this in flat contradiction to their position in the court below. This is perhaps of no special importance, because, of course, the real question is as to the meaning of the act of July 1, 1898, and not whether counsel for appellant have been consistent in their account of its meaning. But we cannot forbear suggesting that it requires in counsel for appellant a considerable degree of cheerful assurance to criticise the Department of the Interior and describe its position as one of "absurdity" for no other reason than that it has ascribed to the act of July 1, 1898, that meaning which they themselves have hitherto not merely admitted, but argued that it bore.

Turning then to the language of the act itself, it is apparent at once that counsel were right as to its meaning in the court below and that they are wrong here. The act means exactly what the Department from the outset has said it means; and we believe the correctness of the departmental construction was never questioned before. It authorizes the company to select unsurveyed lands and it provides that only odd-numbered sections "to be identified by survey when made" shall be selected. How is it pos-

sible to make any selection of unsurveyed lands under these limitations except in terms of future survey? On their own showing counsel read out of the act the words "to be identified by the survey when made." They say expressly (Brief p. 65) that it would not "have changed the meaning in the slightest" if those words had been left out. Why, then, did Congress put them in?

3. Counsel cite and quote extensively from the case of *Bird Timber Company v. Snohomish County*, 81 Wash. 416; 143 Pac. 433, in which the Supreme Court of Washington, relying upon the decision of the Department in the *F. A. Hyde case, supra*, held a description in terms of future survey to be insufficient. They appear to have overlooked the fact that upon rehearing of that case the court *expressly withdrew* all it had said upon that question. *Bird Timber Company v. Snohomish County*, 88 Wash. 90; 152 Pac. 689.

4. At page 42 of their brief, counsel cite the case of *Central Pacific Railroad Company v. Nevada*, 162 U. S. 512, and they quote certain language which they describe as language used by "Mr. Justice Brown, speaking for the court." The language quoted is the language not of Mr. Justice Brown, but of the Supreme Court of Nevada and was used by that court in support of its holding that taxes might not lawfully be levied upon the unsurveyed odd-numbered sections within the forty-mile limits of the grant to the Central Pacific Railroad Company. Whether any other lands in the immediate vicinity had or had not been surveyed was not made to appear; and obviously the case falls far short of holding that a description in terms of future survey can never, in any situation, designate lands

5. Counsel argue that because the Act provides for the filng of a second list after survey in case the description in the first list does not precisely conform to the lines of the official survey, it is therefore apparent that description in the original list in terms of future survey was not contemplated. This argument is answered so completely below that we cannot do better than quote what is said by the trial court (Tr. 83):

> "By the plaintiff much significance is attached to the clause in the latter part of the act, which provides that, 'In case such tract (of unsurveyed land) as originally selected and described in the list filed in the local land office shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity.' It is urged that such a method as was followed here admits of no variation or discrepancy requiring adjustments. *The argument rests wholly upon the assumption that if the method is authorized at all, it is exclusive; but such an assumption is plainly unwarranted.* The Act does not purport to require any given form of description, but upon the other hand gives the widest latitude; its only requirement is that in the selection list the land shall be designated with 'reasonable degree of certainty;' the method of designation is immaterial provided it identifies the land. It was doubtless anticipated that different methods would be employed, and the provision above quoted was intended to point out the course to be pursued in cases where the original description is not tied to the lines of an official survey, as here."

6. The assignments of error do not raise the objection, somewhat pressed at the trial, that the boundaries of the selected tract were not marked on the ground by monuments, blazes and notices; nor is that point touched in appellant's brief. Therefore we forbear to discuss the question.

IV.

But suppose we concede that the view, in which the Department, the District Court and the Court of Appeals have concurred, that a description in terms of future survey is sufficient to designate the land with a reasonable degree of certainty within the meaning of the act of 1899, is erroneous. This brings into play the well settled rule of law that where a party has proceeded, in the acquisition of rights under the public land laws, in the manner prescribed by the Department with respect to matters of *practice and procedure*, his rights are not to be defeated upon the ground that the practice thus established was rooted in an incorrect construction of the law or in unsound views of administrative policy. It has been shown that the selection attacked in this case was made in exact compliance with the practice established by the Department shortly after the passage of the act of 1899, and steadfastly maintained and upheld by it without change for many years thereafter; and rights founded thereon cannot now be destroyed because it is conceived that the practice was wrong, even though this court should be of the opinion that the act was not rightly construed by the Department in the first instance.

The principle upon which this proposition rests has been establishd by numerous decisions of the Department and the courts; and is one of fundamental equity and justice. It recognizes that where the question is one of substantive law—where it is a question whether the land is subject to the particular form of appropriation, or whether the claimant is of the class entitled to take such land—the departmental construction of the statute is not necessarily

binding upon the courts. But where the question is one of *practice and procedure* merely, and where the claimant has, in compliance with the rulings of the Department, taken the particular steps required by departmental regulations, in the manner prescribed by the Department under its construction of the act, he is not to be deprived of his rights upon the ground that such construction was ill-advised and that a different mode of procedure should have been prescribed. This principle rests upon the just and wise basis that a claimant, on whom the statute has conferred the right to acquire title to particular land, ought not to be penalized for his obedience to the rules laid down by the officers to whom the administration of the law is confided.

In *Germania Iron Co. v. James*, (C. C. A. 8th Circuit), 89 Fed. 811, Judge Sanborn said:

> "The reasonable and established rules and practice of judicial tribunals become as much a part of the law of the land as the statutes under which they act. * * * Moreover, the rule and practice here under consideration stand upon far higher ground than the ordinary rules for the mere conduct of proceedings in courts. They condition the inception, the foundation, the very existence, of all rights and title to this land. Rights initiated in accordance with them became vested interests in property, and attempts to establish rights in violation of them were as though they had not been. They had become an established rule of property, upon which men relied and had the right to rely. The maxim, '*Stare decisis, et non quieta movere*,' applies nowhere more universally, or with more salutary effect, than to those rules and that practice under which property is acquired or secured. *It is often far more important that these should be certain and changeless than that they should be right.* Men engage in business occupations, buy, sell, and contract, in reliance upon them. Lawyers advise their clients

and enforce and protect their rights with constant reference to them, and while all interests will readily adjust themselves to, and protect themselves under, erroneous rules, there is neither protection nor safety for any interest under shifting rules. * * * *Nor was it within the supervisory power of the Secretary or of the Commissioner to set aside or annul rights acquired under this rule and practice, or to deprive Hartman of his title to this land, by a retroactive decision, made five years after his right to it had vested, to the effect that the established rule or practice when he made his entry was either inconvenient or erroneous.* They might undoubtedly have made and promulgated a new rule which would have governed cases arising after a new rule of practice had been made and had become known, but Hartman and the other applicants * * * *had the right to the determination of their claims according to the practice as it then existed. Retroactive decisions of judicial tribunals are as vicious and ineffectual as retroactive laws.* * * * System, order, and the uniform application of the laws, the rules, and the practice to all litigants alike, are as essential to the administration of justice in the Land Department as in the courts."

On a second appeal in the same case (*James v. Germania Iron Co.*, 107 Fed. 597) the same learned judge said:

"The rights of these parties vested on February 23, 1889. They were initiated under and conditioned by the laws of the land and the rules and practice of the Department on that day, and no subsequent rules, decisions, or practice could divest them of the property they then secured, or deprive them of their equitable or legal rights to the title to the land which they then acquired. * * * Even if the opinions cited against it had decided that the rule was abrogated or limited, they would have been nothing more than erroneous judgments. They could not have affected the rule. * * * Nothing short of an express and formal repeal or abrogation of the rule and public notice thereof by the Secretary, who alone had the power to establish and overthrow rules, could have destroyed its force or limited its terms. * * *

> Hartman had the right to rely upon this rule and practice, and to secure this land in accordance with it."

In *Howe v. Parker,* (C. C. A. 8th Circuit), 190 Fed. 738, 757, Judge Sanborn again said:

> "The settled rules and practice and the uniform decisions of the department constitute both rules of law and of property, and equitable titles in entrymen cannot be destroyed by the Land Department in violation of them. System, order, and the uniform application of the established rules and practice of the Department to all litigants alike are as essential to the administration of justice in the Land Department as in the courts. What a farce the attempt to secure or protect rights in any judicial or quasi judicial tribunal must become if its rules and decisions are ignored or applied to each case as it arises at the arbitrary will of the officer who presides. Equitable titles of claimants to lands under the acts of Congress may not be annulled by the Land Department in violation of its settled practice, or of a rule of law and of property established by a long line of decisions of its officers."

The great leading case on the subject is *United States v. MacDaniel,* 7 Pet. 1, 14. And we may say in passing that we have found no case in which the principle of the *MacDaniel* case has been questioned or its authority doubted. That case arose upon an attempt to recover from a clerk in the Navy Department special allowances paid him under a practice or usage in force in the Department, which was afterwards abrogated. There was no specific rule, regulation or decision sanctioning such payments—the matter was merely one of customary usage and practice in the Department. It was admitted that there was no statutory authority for such payments. This court held the new ruling valid and effective as applied

to subsequent transactions, but also held that although this new ruling might be based upon a true construction of the law, and might properly have been applied in the first instance, yet it could not be given a retroactive effect in derogation of past transactions founded upon a construction theretofore given the law by the Department, as established by its previous usage and practice; and the judgment of the court denied recovery of the sums paid. In this connection it was said:

> "A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of any department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. * * * Hence, of necessity, *usages have been established in every department of the Government, which have become a kind of common law*, and regulate the rights and duties of those who act within their respective limits. *And no change of such usages can have a retrospective effect, but must be limited to the future.* Usage cannot alter the law, but it is evidence of the construction given to it, *and must be considered binding on past transactions.*"

Rand v. United States, 38 Fed., 665, is a case which applied the doctrine of *United States v. MacDaniel* to the question whether certain officers of the Treasury Department were entitled to fees for certain services. There was no statutory authorization for such charges, but the previous usage of the Department permitted them.

A somewhat similar application of the rule was made in *Walker v. United States*, 139 Fed., 409, 416, where the language we have excerpted from the *MacDaniel* case was approved and applied.

United States v. Alabama, etc., Railroad Co., 142 U. S., 615, 621, is another well-known authority, in which the *MacDaniel* case is cited and approved. In that case Mr. Justice Brown said:

> "We think the contemporaneous construction thus given by the executive department of the Government and continued for nine years through six different administrations of that department * * * should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. *It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive.*"

In *United States v. Newport News, etc., Co.*, 178 Fed., 194, the Court of Appeals of the Fourth Circuit applied the doctrine of the *MacDaniel* case to the construction of a contract between the Government and a shipbuilding company, holding the latter protected by customary practice in previous transactions. The court quoted from the *MacDaniel* case the language excerpted on a preceeding page, and upon that authority held that the course of customary practice in previous transactions between the Government and its contractors must be deemed to have established a rule in the light of which the contract should be construed; so that a different requirement, although supported by the terms of the contract itself, would be equivalent to a retroactive change in established usage which could not be made to the prejudice of rights already

initiated, under the principle established by the *MacDaniel* case.

And as lately as *Haas v. Henkel*, 216 U. S., 462, 480, and *United States v. Birdsall*, 233 U. S. 223, 231, this court has quoted with approval the language of *United States v. MacDaniel* to which such frequent reference has already been made.

In *State v. Kelsey*, 44 N. J. L., 1, 22, the New Jersey court quoted with approval the following language of the Supreme Court of Massachusetts in *Rogers v. Godwin*, 2 Mass., 477:

> "And although if it were now *res integra* it might be very difficult to maintain such construction, yet at this day the *argumentum ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long-continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words."

In *Stuart v. Laird*, 1 Cranch, 299, this Court said:

> "To this objection, which is of recent date, it is sufficient to observe that *practice and acquiescence* under it for a period of several years * * * affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

In *Commonwealth v. Gregory*, 89 S. W. Rep., 168, the Court of Appeals of Kentucky quoted with approval the language of an earlier Kentucky case (*Harrison v. Commonwealth*, 83 Ky., 162), where it was said:

> "The executive branch of a government must necessarily give a construction to the laws which it must execute; and, if its construction has been followed for years, and in view of and without interefrence by the law-making power, then such contemporaneous and long-continued construction should not be departed from without the most cogent reasons. *A long-continued practice* under a statute, under such circumstances, ripens into an authoritative construction of it."

In *United States v. Hammers*, 221 U. S., 220, which involved the question of the assignability of desert land entries, this Court said:

> "We do not find the act of 1891 as clear as the learned District Court did, and must give to decisions of the Land Department the weight to which in such case, the court acknowledged, they are entitled. * * * Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the *practice* of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. *At any rate their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive.*"

Turning now to the decisions of the Department, we find numerous cases in which the precise question was directly considered. The leading case appears to be *Mary R. Leonard*, 9 L. D., 189. In that case a timber-culture claimant had made proof of entry and cultivation in compliance with the practice in force at the time of the entry; but by a decision subsequently rendered it was held that this practice was based upon an erroneous construction of the timber-culture law. The Department nevertheless held that the entryman was protected by compliance with the previ-

ous practice, even though erroneous, and Secretary Noble said:

> "Under the latter, which it is not denied by the counsel for the petitioner, is the correct construction of the law, the proof was insufficient. It is contended that inasmuch as the proof was in accordance with the law as construed when it was offered and accepted, that the subsequent change of construction should not be held to operate retroactively so as to invalidate it. In the case of *Miner v. Mariott*, 2 L. D., 709, it is said by this Department, that though 'a construction is clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretaton.' * * * In its practical administration, the law must be held to be what for the time being it is construed to be by the tribunals lawfully constituted for that purpose. This course is not only dictated by the necessity of the case, but is in accordance with reason and justice. To give a retroactive effect to a change of construction by a court or other tribunal, so as to render illegal acts which have been performed with trouble and expense in accordance with and on the faith of the former construction would seem to be as 'unjust as to hold that rights acquired under a statute may be lost by its repeal.'"

Miner v. Mariott, 2 L. D., 709, cited in the *Leonard* case, is another leading authority. In that case it was held that a previous practice of the Department (not based upon specific regulations, but upon custom and rulings) with respect to the time within which an adverse claim might be filed, was erroneous, being founded upon a wrong construction of the statute. But the Secretary held that the claimant was protected by his compliance with the practice previously sanctioned, saying:

> "The rule of this decision should not operate to interfere with or take away any rights acquired under the law as it has heretofore been construed by your

> office. *Though that construction is, in my opinion, clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation. Until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal.*"

In *Henry W. Fuss*, 5 L. D., 167, cited in the *Leonard* case, assignments of desert-land entries made while a rule allowing the same was in force were recognized, notwithstanding that rule was founded upon what was afterwards held to be an erroneous interpretation of the statute. Secretary (afterwards Mr. Justice) Lamar said:

> "Although it is silent on this question, I think a reasonable construction of the act as a whole, its purpose and intent being considered, warrants the rule against assignment; but being a matter of construction, or more correctly speaking of administrative policy, and a question which has been involved in some doubt, as would appear from the fact that the rule has been changed. *the regulation of your office which recognized the right of assignment had, until revoked, or overruled, the force and effect of law, so that rights acquired and valid thereunder should be protected.*"

In *Cudney v. Flannery*, 1 L. D., 165, Secretary Teller said:

> "The regulations and rules of your office and of this Department in force at the date of Flannery's entry have the force of law as respected a tract subject to entry. There was then no objection to such an entry, and Flannery's was allowed as legal and made in accordance with what was considered a correct interpretation of the statute. *He thereby acquired rights which cannot now legally or equitably be repudiated * * * even though such an entry might not now be allowed. The latter rulings cannot have this retroactive effect.*"

In *David B. Dole*, 3 L. D., 214, Secretary Teller said:

> "I think it immaterial that the construction was erroneous and unwarranted, so long as it was the official announcement of the law by the Land Department. * * * I do not understand that a party acts under a misapprehension of the law, so as to lose any right, when he acts under its official interpretation. The misapprehension in such a case is upon the part of the interpreting authority, and not upon him who in the prosecution of a claim conforms to such interpretation. A different rule would permit every person to construe the law for himself; and hence, your office being a proper exponent of this law, entrymen and their assignees acting under such exposition should not be required to forfeit any right by subsequent construction inconsistent with the first."

The instructions of July 16, 1889, 9 L. D., 86, contain the following language:

> "But if the entry was made under rulings of the Department in force when the application was made, that ruling should be allowed to stand and control the case. Until a rule is changed it has all the force of law and acts done under it while it is in force must be regarded as legal. * * * It seems to me that, inasmuch as the Department from the time of the passage of the bill up to the circular of the date of June 27, 1887, erroneously construed the true spirit and intent of the act, and in pursuance thereof numerous entries have been made under the law as thus promulgated, amounting to some 2,500 or more, that such entries should be protected under the construction thus given the act, giving such construction all the force and effect of law. Were it not so, great wrong and inconvenience would result. In this character of entries it has been repeatedly held that, if the entry is made under rulings of this Department in force when the application is made, it should be allowed to stand. Until a rule is changed it has all the force of law and acts done under it while it is in force must be regarded as legal."

In *C. P. Masterson*, on review, 7 L. D. 577, it was said:

> "I am unable to find that the Land Department has in any case directly announced the principle that coal-land entries may be made of non-contiguous subdivisions; but it seems to be a fact that such was the practice of your office, and that in many instances entries consisting of non-contiguous subdivisions have been allowed to pass to patent. It is evident that such action was not inadvertence, but an erroneous construction of the law. The entry in the present case was allowed under the practice then prevailing in your office. It has been held by the Department that where a decision operates to change a practice or rule well established, especially if it be upon a point of interpretation not without difficulty, the action already taken by private parties in good faith under the prevailing practice may be sustained in proper cases; and although such construction may have been erroneous, it does not follow that any acts which have been performed in pursuance of or in accordance with such construction or interpretation, are necessarily illegal."

The same doctrine has been applied, in varying language and under various sets of circumstances, in a great number of departmental decisions, among which are the following:

Milne v. Ellsworth, 3 L. D., 213.

Isham Floyd, 5 L. D., 531.

James Spencer, 6 L. D., 217.

Candido v. Fargo, 7 L. D., 75.

C. P. Masterson, on review, 7 L. D., 577.

William Thompson, 8 L. D., 104.

John M. Lindback, 9 L. D., 284.

J. H. Kopperud, 10 L. D., 93.

Jacob Oswald, 11 L. D., 155.

Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391.

Oro Placer Claim, 11 L. D., 457.
Edwin F. Frost, 21 L. D., 38.
Tustin v. Adams, 22 L. D., 266, 270.
Ella I. Dickey, 22 L. D., 351.
State of California, 22 L. D., 428.
Kirk v. Brooks, 24 L. D., 448.
Labathe v. Robords, 25 L. D., 207.
Rough Rider and Other Lode Claims, 42 L. D., 584.

There is no room for distinction, with respect to the application of the principle declared in the authorities cited, between cases where the rule of practice or procedure which was held to protect a claimant who had complied therewith, was a rule established by express regulation, circular or instruction, or by departmental ruling or decision, and cases of a rule not founded upon express regulation or decision, but built up by custom, usage or practice. Many of the cases cited above are of the latter character, as will appear from the language we have quoted. This is especially true of some of the most important of them; notably *United States v. MacDaniel*, 7 Pet. 1, which is the leading case in the courts.

In *Haas v. Henkel*, 166 Fed. 621, 627, it was said:

> "Such regulations, as held in *United States v. MacDaniel*, 7 Pet. 14, need not be in the form of writing, but may consist of established usages and practices, which have become a kind of a common law of the Department."

And in the very recent case of *United States v. Birdsall*, 233 U. S. 223, 231, Mr. Justice Hughes said:

"Nor was it necessary that the requirements should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities. *United States v. MacDaniel*, 7 Pet. 1, 14."

Let us emphasize the fact that the question is not one having to do with substantive rights under the statute. It is not a question of who can take under the act, or of what land may be taken, or of the extent or character of the appropriation. It is merely a question of *procedure*—of what steps must be taken in order to perfect the right granted. The Department, construing the statute, pointed out the steps to be taken. The Railway Company followed the line thus marked out, faithfully and with exactness. The rights of the respondent Timber Company were acquired on the faith of the regularity of the Railway Company's procedure, in the light of the departmental sanction given it. No one was misled or prejudiced by the fact that the Railway Company pursued the approved practice instead of adopting a different method. The Railway Company could just as well and just as easily have taken another course, and would have done so if the Department had so directed. And it cannot be pretended that appellant's position would be any different or better if the Department had construed the act differently and had required a different course of procedure. Certainly he would not have been benefited if the selection list had described the land by metes and bounds, or in some other manner, since his evidence is to the effect that he made no inquiry at or examination of the records of the local

land office and was unaware that any selection list had been filed; so, as the learned District Judge points out, he "had no knowledge of the existence of the list, and therefore, whatever may have been the form of description, it could not have influenced his action." (Tr. 86.)

Much is said in appellant's brief of the duty of the courts to apply the strictest possible construction to the act of 1899, as against the Railway Company and its grantee. But in the first place the act of 1899 is not a *grant* as counsel seems to understand that term. It is thus described by the Department and the courts, in language a part of which is quoted elsewhere in this brief:

> "The act is contractual in character and terms, and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer. This is especially true where this amounts to a limitation upon the enjoyment of the right by the party as to whom the contract still remains executory. In the opinion of the Department every element of a contract is present in the act of March 2, 1899."

But even if the act of 1899 were subject to the same rules of construction as the original Northern Pacific grant, it does not follow that an especially strict construction should be applied. The rule in such cases is well stated in *Burke v. Southern Pacific Railroad Company*, 234 U. S. 669, 679, where Mr. Justice Van Devanter says of a grant similar to the Northern Pacific grant of 1864:

"We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties *were brought into such contractual relations that the terms of the proposal became obligatory on both*. *Menotti v. Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, *it earned the right to the lands described*. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government, but the grant *should not be treated as a mere gift*."

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APPENDIX.

DEPARTMENT OF THE INTERIOR.

Washington, February 16, 1915.

D-578.
D-15944.

KIP CALKINS MILES ET AL.,

vs.

NORTHERN PACIFIC RAILWAY CO.

(Marble Creek, Idaho, Cases.)

APPLICATION FOR HEARING, ORAL ARGUMENT, AND REQUEST FOR OPINION OF ATTORNEY GENERAL.

In the above entitled cases involving contests brought by certain settlers on public lands in the Marble Creek, Idaho, region, against the Northern Pacific Railway Company's selection of the same lands under authority of the act of March 2, 1899, (30 Stat., 993), counsel for the settlers have requested a rehearing (including oral argument) and, in the event that "the Department cannot see its way to grant our motion * * * and recall and vacate its former decision, that the Attorney General be requested to give his opinion." Two printed briefs are

filed on behalf of the settlers, in which briefs the case of said settlers is presented very thoroughly and forcibly.

The Department's decision in the leading case (that of *Frank O. Daniels v. Northern Pacific Railway Company*, 43 L. D. 381) was based upon an affirmative finding upon the following issues, which issues are believed to be determinative of the cases of all the Marble Creek settlers:

> Was the land classified as non-mineral at the time of the actual survey so as to bring it within the terms of the act of March 2, 1899 (30 Stats. 993).
>
> If so classified, was the description by technical legal subdivisions which the tracts would bear "when surveyed" a description of "reasonable certainty", as required by the act. * * *
>
> Was the notice of the selection given?

Counsel for the Marble Creek settlers, in their second brief above mentioned, ask that—

> whatever view the department may take of the law governing these selections and the rights of our clients that the facts as to the mineral classification of the lands, the lack of proximity of established Government surveyes to Township 44 N., Rgs. 2 and 3 East, as well as the other facts fully shown in the hearing in the Miles case be set out in any decision which may be made concerning these claims.

Regarding the "mineral classification of the lands," the Department, upon full consideration of the question, adheres to the conclusion reached in the Daniels case, that, under the long-followed practice of the land department, "land not returned as mineral" when official surveys are made "is held to be as effectually classified as agricultural land as if so returned in the field notes." It may be that the land settled upon by Mrs. Miles and some of the other settlers had been classified as mineral by the special Gov-

ernment commission appointed under the terms of the act of February 26, 1895 (28 Stat., 683), but what shall constitute "non-mineral public lands" for the purpose of the act of March 2, 1899 (30 Stat., 993) upon which the Northern Pacific Railway Company's case rests, is set forth in the act itself as follows: "so classified as non-mineral at the time of actual Government survey, which has been or shall be made, of the United States." In the case of *State of Idaho et al., v. Northern Pacific Railway Co.,* (37 L. D., 135), the Department held that the fact that lands were classified as mineral under the act of February 26, 1895, *supra,* would not prevent selection thereof by the Northern Pacific Railway Company under the act of March 2, 1899, *supra,* if otherwise within the terms of that Act. As matter of fact, the lands involved have been ascertained to be non-mineral, and, were the contrary the case, the settlers would be precluded from making agricultural entry thereof.

Regarding "the lack of proximity of established Government surveys" to the lands here involved, it may be stated that, whilst not an issue in this case or the Daniels case, the decision in the latter case did discuss the question whether Daniels might not, from existing corners of the Government surveys, have ascertained, without much difficulty, the locus of the land he settled upon in its relation to the public surveys. If, as appears from the record, the land was subject to selection by the railway company, and, prior to the settlers going thereon, the company filed its selection list in the local office—the only notice required by the act of 1899—any difficulty the settlers might be under in determining the location of the land, due to the lack of Government surveys, could not give them

rights paramount to those of the railway company. Furthermore, it is shown by the records and admitted in the brief and argument upon the pending motion, that at the dates of the alleged settlements under consideration, the north and west boundaries of T. 44 N., R. 2 E., and the north boundary of T. 44 N., R. 3 E., had been established; and the Department adheres to its decision that, under such circumstances, the locus of any tract within those townships could then have been ascertained, to a reasonable certainty, by the exercise of ordinary diligence and intelligence.

The decision of the Department has been carefully reexamined in the light of the arguments advanced by counsel in the briefs filed, but nothing is found calling for a different conclusion from that previously reached in the case. The motion for rehearing, request for oral argument, and conditional request for reference of the case to the Attorney General, are therefore denied.

(Signed) A. A. JONES,
First Assistant Secretary.

WEST *v.* EDWARD RUTLEDGE TIMBER COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 276. Argued May 7, 8, 1917.—Decided May 21, 1917.

The Act of March 2, 1899, c. 377, 30 Stat. 993, in providing for conveyance to the United States by the Northern Pacific Railroad Company of lands within the Mount Ranier National Park in exchange for public lands to be selected elsewhere, is to be construed as extending to that company's successor in title though no successor is named; and the Northern Pacific Railway Company, recognized as such successor by the Land Department both in the making of the conveyance of base lands and in the enjoyment of the right of lieu selection, is not to be denied that right upon the hypothesis that the Northern Pacific Railroad Company had ceased to exist before the date of the act.

In surveying and reporting on public lands, a deputy surveyor described them as suitable for grazing, if cleared, but more valuable for timber at the time. This having been accepted and acted upon by the Land Department as a description of the lands as nonmineral, *Held*, that they were to be regarded as "classified as nonmineral at the time of actual Government survey," for the purposes of lieu selection by the Northern Pacific Railway Company under the Act of March 2, 1899, *supra*.

Whether a preliminary lieu selection of unsurveyed public land may be said to designate the tract "with a reasonable degree of certainty," under the Act of March 2, 1899, *supra*, is a question in the nature of a question of fact to be determined upon the circumstances of each case. A description in terms of future survey may suffice if the land may be located therefrom with the aid of an adjoining survey already made.

Semble, that the rule limiting inquiry in this court to questions presented to the court below (*Montana Railway Co.* v. *Warren*, 137 U. S. 348) is not confined to questions of procedure and is not inflexible.

221 Fed. Rep. 30, affirmed.

SUIT by appellant West (he was plaintiff in the court below and we shall so refer to him) against appellees, the Edward Rutledge Timber Company and the Northern Pacific Railway Company (to be referred to as the timber company and railway company, respectively,) to have plaintiff declared the owner of certain described lands, the railway company and the timber company decreed to hold title thereto in trust for him, to compel a conveyance to him and to have his title to the lands quieted.

Plaintiff alleged himself qualified to locate and did locate and settle upon the lands, they being then unsurveyed and vacant, unoccupied and unreserved lands belonging to the United States as to which no claim of right or title to or interest in them had been made by any person, nor was there any evidence whatsoever upon the lands or any part thereof, or in the United States Land Office for the district (Coeur d'Alene Land District), or in the General Land Office in Washington showing any claim, right, title or interest in any other person, nor were there any marks, blazes, notices or any other evidence of the location, selection, claim or possession marked or traced upon the ground, or upon or near the same, nor had the boundaries thereof been traced or located by reference to any natural objects or monuments of any kind or character.

That on July 17, 1905, the official plat of the survey of the lands was filed in the local land office in Coeur d'Alene City, Idaho, and on that day the lands became open to entry under the homestead laws of the United States and on that day plaintiff duly made application to enter them under the homestead laws, which application was rejected by the local land office, and, on May 10, 1910, the order of rejection was approved by the Secretary of the Interior and the case finally closed.

That on June 21, 1901, the railway company filed in the General Land Office its selection list No. 61 which con-

tained the following pretended description, to-wit, "the Southeast Quarter of Section 20, Township 44 North, Range 3 E., B. M."

That the description was wholly imaginary and that no lands in the State of Idaho or elsewhere were or could be so designated or described for the reason that at the time of filing the list no such survey had been made or attempted. That neither the railway company nor the timber company knew or pretended to know what lands were referred to or knew that in the event of a survey the description would be applied to the lands occupied by plaintiff. That the description was wholly insufficient to locate the lands or any part or parcel thereof, rendering the list and selection of the railway company wholly void and of no effect whatsoever.

That on October 10, 1910, a patent to the lands was issued to the railway company.

That (this on information and belief) the railway company conveyed the lands to the timber company and that company now claims to have the legal title to the same.

That neither the railway company nor the timber company nor any agent or employee of either has ever been in possession of the lands, but plaintiff, ever since May 15, 1903, has been and now is in possession thereof; that neither the railway company nor the timber company has ever complied with the laws of the United States so as to entitle either of them to claim any interest in or right to the lands as against plaintiff.

That the decision of the local land office and the successive approval thereof by the Commissioner of the General Land Office and the Secretary of the Interior were and are wrongful, unlawful and based upon an erroneous construction of the law and upon a statement of facts concerning which there was and is no conflict.

That at the time the patent was issued to the railway

company plaintiff was and now is the owner of the lands and the issue of the patent to the railway company was contrary to and without authority of law and in violation of plaintiff's rights; that the railway company was without any right or authority at law to select or claim the lands or any part thereof and that the Act of Congress of March 2, 1899, upon and by virtue of which the railway company based its right to select and claim the lands, is unconstitutional and void and confers no right whatsoever upon the railway company to select or claim the lands or any part thereof against plaintiff.

The answer of the timber company admitted certain allegations of the bill of complaint but denied that the lands were vacant and open to settlement or that they were unclaimed or unsegregated or not marked or traced by boundaries, and alleged that the fact of their appropriation and segregation appeared on the records of the local land office and of the General Land Office and that the boundaries and lines of survey were duly and plainly traced and marked out upon the lands and located by monuments long prior to the time of plaintiff's settlement thereon, and that plaintiff had full knowledge thereof and did not enter upon the lands in good faith but only in the hope that the claim of the timber company and railway company might be defeated on technical grounds.

That on June 21, 1901, the railway company made selection of the lands under the provisions of the Act of Congress entitled "An Act To set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Ranier National Park," approved March 2, 1899, 30 Stat. 993, in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of the act. That such selection was duly made in accordance with the conditions of the act and the rules and regulations of the Land Department and described

as required by the act, and the selection was in all respects regular.

That on July 17, 1905, the official township plat was filed in the local land office and the railway company, in accordance with the provisions of § 4 of the act of Congress, filed a new selection list which conformed to the provisions of the act and the rules and regulations of the Land Department.

That at the time plaintiff made his alleged settlement upon the lands they had been surveyed and the lines of survey traced, and all other conditions are alleged to have been satisfied.

The timber company prayed that it be dismissed with costs.

The answer of the railway company was substantially the same as that of the timber company.

To the issues thus framed the evidence was addressed, upon which a decree was entered for defendants dismissing the bill, neither party to recover costs or disbursements from the other. 210 Fed. Rep. 189. It was affirmed by the Circuit Court of Appeals. 221 Fed. Rep. 30.

Mr. S. M. Stockslager, with whom *Mr. A. H. Kenyon* and *Mr. Seabury Merritt* were on the briefs, for appellant.

Mr. Charles Donnelly and *Mr. Stiles W. Burr*, with whom *Mr. Charles W. Bunn* and *Mr. James B. Kerr* were on the brief, for appellees.

Mr. Justice McKenna, after making the above statement, delivered the opinion of the court.

The controversy in the case turns on the construction and application of the act of Congress. Because of it the land offices, local and general, rejected plaintiff's application to enter the lands as a homestead. By virtue of it the railway and its grantee, the timber company, assert

title. Its primary purpose was to set aside certain public lands as a national park to be known as the Mount Ranier National Park. An obstacle to the purpose was a grant of the desired lands to the Northern Pacific Railroad Company and their relinquishment had to be provided for. This was done (§ 3) by authorizing the company to select an equal quantity of public lands elsewhere, or, more specifically, within any State into or through which the railroad ran. There was qualification of the character of the lands to be selected. They were to be "nonmineral public lands, so classified as nonmineral at the time of actual Government survey, which has been or shall be made, . . . not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection."

It was provided (§ 4) that upon the filing by the railroad company of the selection at the local land office and payment of fees prescribed by law in analogous cases and the approval by the Secretary of the Interior, he should cause a patent to issue to the company conveying to it the lands so selected; that "in case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company . . . shall describe such tract in such manner as to designate the same with a reasonable degree of certainty"; and that within three months after the tract shall have been surveyed and the plats thereof filed a new selection shall be filed by the company describing the tract according to such survey. And, further, that in case the tract as originally selected and described in the list filed in the local land office shall not precisely conform to the lines of the official survey, the company shall be permitted to describe such tract anew, so as to work such conformity.

Construing the act by its words there would seem to be no difficulty in determining its meaning. It would seem to be simple in purpose and clear in provision to accom-

plish the purpose. But plaintiff raises various questions upon it. He asserts: (1) That the grant was to the Northern Pacific Railroad Company and could not be availed of by its successor through foreclosure, the Northern Pacific Railway Company. (2) That the lands were classified as mineral under the Act of Congress of February 26, 1895, 28 Stat., 683, and the classification approved by the Secretary of the Interior March, 1901, and the surveyor having failed to make any classification of the lands in terms as non-mineral they were not subject to selection. (3) That if the first and second contentions be untenable, the lands were not described "with a reasonable certainty" so as to bar the rights of settlers in good faith without actual or constructive notice.

(1) The argument advanced to support this proposition is that by the foreclosure proceedings the Northern Pacific Railroad Company ceased to exist and, if everything it had or had an interest in did not go out of existence with it, at least its rights under the Act of 1899 did, and yet counsel say plaintiff has nothing to do "with the question whether the conveyance of the lands to the United States under the provisions of the act conveyed a valid title." It would be somewhat anomalous indeed if the act conveyed to the United States a valid title but did not convey to the railroad anything substantial that could be transferred by sale under the decree of a court to the successor of that company. We might ask the question, Where in the world were the rights conveyed to the railroad company left—and if left at all, by whom were they to be enforced or availed of?

We agree with the District Court that as a mere matter of construction the contention of plaintiff must be rejected. In July, 1896 (*Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, 490; *Northern Pacific Ry. Co.* v. *United States*, 176 Fed. Rep. 706), three years prior to the act of Congress, the railway company had become successor to the

railroad company, its vendor through the foreclosure proceedings of the lands the Government desired, and yet the latter company was designated in the act as the company to select the lands in compensation for those desired and taken by the Government for the Mount Ranier National Park. It may be, as said by the District Court, a matter of speculation why the railroad company rather than the railway company was named as grantee, but it is certain it was done in recognition of rights and not in mere jugglery to obtain lands for the National Park and convey nothing to either company in return—nothing to the railroad company because, according to the contention, it had gone out of existence; nothing to the railway company because, according to the contention, it had not succeeded to the rights of the railroad company. On the contrary, we must assume that the act was passed and the railroad company selected to consummate the exchange either by itself or by its successor, the railway company, or by both. And this was done and the two companies and the trustees of the railway company's mortgage joined in a deed of reconveyance to the United States. And this purpose of the act and what was done under it was recognized by the Land Department. *Davenport* v. *Northern Pacific Ry. Co.*, 32 L. D. 28; *Ferguson* v. *Northern Pacific Ry. Co.*, 33 L. D. 634; *Idaho* v. *Northern Pacific Ry. Co.*, 37 L. D. 135, 138. See also *Delany* v. *Same*. 45 L. D. 6. It is pertinently said by counsel for the railway company: "The government itself is satisfied with its title; and certainly it cannot, while retaining that title, deny to those from whom it was obtained the lands offered in exchange."

(2) As we have seen, the right was to select "an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual Government survey." The lands are in fact non-mineral, but the contention is that they were not so classified at the time of actual survey.

The deputy surveyor who made the survey reported that the lands, if cleared, would be suitable for grazing, but at the time of the report were more valuable for their timber. This, it is contended, is not a classification of the lands as non-mineral, that it was not a classification but an omission to classify—negative, not affirmative; inferential, not positive—and therefore not a compliance with the statute. We cannot concur. The report was accepted by the department as a description of the lands as non-mineral. They could be made suitable for grazing, was the report; pending that time they were more valuable for their timber. There was positive description of their character; words excluding some other character were not necessary. Classification is characterization through the selection of some quality or feature, and therefore lands may be classified as pasture (grazing), timber, arabie or mineral. It is determined by surface indications. Minerals may be hidden under any surface, but a surveyor is not expected to explore for them that he may include or exclude reference to them in his reports. Such character is exceptional, besides, and considered by the land office as absent if not noted.[1]

The contention that the lands were classified as mineral under the Act of February 26, 1895, is answered by the admission made at the trial that the records do not show it.

(3) The act of Congress authorized the selection of an unsurveyed tract, but required it to be described "in such manner as to designate the same with a reasonable degree of certainty," and it was provided that when surveyed a new list was to be filed describing the tract "according to such survey."

The lands, we have seen, were designated by sectional

[1] *Davenport* v. *Northern Pacific Ry. Co.*, 32 L. D. 28; *Bedal* v. *St. Paul, M. & M. Ry. Co.*, 29 L. D. 254; *Idaho* v. *Northern Pacific Ry. Co.*, 37 L. D. 135; *St. Paul, M. & M. Ry. Co.*, 34 L. D. 211; *Northern Pacific Ry. Co.*, 40 L. D. 64.

number, township and range, and it is contended that such designation—"terms of future survey," as counsel term it—was not a description "with a reasonable degree of certainty."

This seems to have been the only contention submitted to the Court of Appeals and upon careful consideration the court decided against the contention upon the Act of 1899 and, in analogy, upon other acts of Congress in relation to the public lands and also upon the rules and decisions of the Land Department. It is not necessary to repeat the reasoning of the court. What was a description having "a reasonable degree of certainty" was to be determined by the circumstances. It was in the nature of a question of fact and had tests for decision, as the Court of Appeals pointed out. It had the aid of an adjoining survey and the lands could be readily located from such survey. It was pointed out that the act of Congress did not require exactness; it contemplated a subsequent readjustment. "The filing of the first list is in a sense preliminary to obtaining the patent. It initiates the right, and not as much particularity and exactness is ordinarily required as to where final stages are to be observed in clearing up and completing the transaction. In fact, by contemplation of the statute, the new selection is required to conform with the established survey and thus to correct the description in the primary selection. By reasonable intendment, therefore, we are impressed that the description contained in the Railway Company's list No. 61, under the conditions prevailing of the survey of Township 45 to the north and the proximity of the land in question thereto, designated the land with a reasonable degree of certainty, and must be held sufficient as a matter of law." For the premises from which this excerpt is the conclusion we refer to the opinion.

The Court of Appeals said that the question of the sufficiency of the description was "the single question

urged" for its decision and counsel for defendants contend that no other question is open to our review, and cite *Montana Railway Co.* v. *Warren*, 137 U. S. 348, 351. Plaintiff replies that the principle of that case applies only to questions of procedure and not to questions of jurisdiction or the foundation of the right, adducing *Rosen* v. *United States*, 161 U. S. 29; *Old Jordan Mining & Milling Co.* v. *Société Anonyme Des Mines*, 164 U. S. 261; *Gila Valley, Globe & Northern Ry. Co.* v. *Hall*, 232 U. S. 94. See also *Magruder* v. *Drury*, 235 U. S. 106, 113.

The distinction between questions seems to be artificial. The essential circumstance would seem to be that a review is sought of that which was not decided, not submitted at all or withdrawn from submission and which, if it had been submitted, might have been decided in favor of the appealing party.

However, in deference to the earnestness of counsel, we have considered the questions.

Affirmed.